Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

MICHAEL D. JONES, et al.,

Petitioners,

vs.

RESOLUTION TRUST CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the independent tort exception of the *D'Oench, Duhme* Doctrine should be limited to cases not addressing "ORDINARY BANKING TRANSACTIONS"?

2. Whether the *D'Oench* Doctrine applies to claims which do not directly challenge the validity of a note or mortgage?

LIST OF PARTIES

The parties to the proceedings are:

Petitioners:

MICHAEL D. JONES, ROBERT S. GUSKIEWICZ, R.S. FUTCH, JR., LAKE PICKETT, LTD., a Florida limited partnership, and MICHAEL D. JONES, as general partner, d/b/a LAKE PICKETT, LTD., a Florida limited partnership.

Respondents:

RESOLUTION TRUST CORPORATION, in its corporate capacity, and RESOLUTION TRUST CORPORATION, as Receiver for Freedom Savings and Loan Association.

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STATEMENT OF JURISDICTION

This Court's jurisdiction to review a decision of the United States Court of Appeals for the Eleventh Circuit, affirming the decision and final judgment of the United States District Court for the Middle District of Florida is invoked pursuant to 28 U.S.C. § 1254(1).

Respondents removed these consolidated cases to the United States District Court for the Middle District of Florida, pursuant to 28 U.S.C. §§ 1331 and 1441, and 12 U.S.C. § 1730(K)(1)(C). A final judgment in Respondents' favor was entered by the District Court on August 15, 1991 (App. I, 101a). On August 21, 1991, Petitioners timely filed a

Motion for Rehearing, which was denied by the District Court on September 3, 1991 (App. H, 98a-100a). Petitioners filed a timely Notice of appeal to the Eleventh Circuit Court of Appeals on September 19, 1991. Title 28 U.S.C. § 1291 provided federal appellate jurisdiction over the final judgment of the District Court.

The Eleventh Circuit Court of Appeals, en banc, rendered its opinion on January 26, 1995, affirming the decision of the trial court. *Jones v. Resolution Trust Corp.*, 20 F.3d 397 (11th Cir. 1995) (App. A, 1a - 31a). Petitioners timely filed a Petition for Rehearing From En Banc Decision on February 9, 1995, and, upon an enlargement of time, an Amended Petition for Rehearing from En Banc Decision on February 20, 1995. On March 13, 1995, the Eleventh Circuit Court of Appeals denied Petitioners' Petition for Rehearing from En Banc Decision (App. D, 85a - 87a). This Petition for Writ of Certiorari is timely filed within ninety (90) days of March 13, 1995, by June 11, 1995.

STATUTES INVOLVED

12 U.S.C. § 1823(e).

(e) Agreements against interests of Corporation

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement –

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

STATEMENT OF THE CASE

On July 23, 1987, the Federal Home Loan Bank Board ("FHLBB") took control of Freedom Savings and Loan Association ("Freedom"). FHLBB appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver of Freedom. FSLIC reorganized Freedom into a federal savings and loan institution ("New Freedom"). FHLBB hand-picked the Board of Directors of New Freedom.

Freedom, at the direction of FSLIC, acting in its corporate capacity, entered into a Management Contract with the First, F.A. of Orlando ("The First, F.A."), a local federal savings and loan association, and previous competitor of Freedom, to provide management services to New Freedom. The First, F.A. was also required to report to FSLIC on the business condition of New Freedom and make recommendations to FSLIC on how to handle New

Freedom assets. Jack Shirek, the Executive Vice President and Chief Operating Officer of the First, F.A., was appointed by FSLIC as President of New Freedom. Shirek's salary was paid directly by FSLIC and, in his deposition, Shirek testified that the management agreement was between the First, F.A. and FSLIC. The Management Contract between the First, F.A. and FSLIC was for a one-year period commencing July 23, 1987, to conclude July 23, 1988. Prior to completing its one-year obligation under the contract, but subsequent to the tortious conduct complained of herein by the Petitioners, The First, F.A. terminated the contract because of the First, F.A.'s own self interest in acquiring assets belonging to New Freedom from FSLIC.

On February 7, 1989, FSLIC became the sole conservator of New Freedom and on October 13, 1989, the Resolution Trust Corporation ("RTC") acquired the assets and liabilities of New Freedom. The FHLBB and FSLIC were abolished by the Financial Institution Reform, Recovery and Enforcement Act of 1989 (FIRREA) and the RTC was substituted for these entities.

RTC has divided itself into two entities: RTC-Corporate and RTC-Receiver. RTC-Corporate took the assets of New Freedom while RTC-Receiver took the liabilities of New Freedom. The federal regulators, FHLBB, FSLIC, FDIC and RTC, maintained total dominion and control over New Freedom, either directly or through the use of a management agent, since July 23, 1987, almost a year before the tortious conduct alleged by Petitioners occurred.

Sometime after the creation of New Freedom, between February and May of 1988, the Petitioners were approached with offers to purchase both the Lake Pickett property ("Pickett Downs") and the Seminole Flying Ranch property ("Ranch"). It was the actions of New Freedom, not the failed savings and loan institution ("Freedom"), which formed the basis of the Petitioners' tort claims.

A. LAKE PICKETT PROPERTY

In February of 1988, Petitioner, Michael D. Jones ("Jones") was approached by a group of builders interested in buying the Pickett Downs residential development. Jones discussed the purchase with Steve Chitwood, a broker representing some of the other builders of the Pickett Downs project, and Terry Hagen, a builder who already owned several lots in Phase IV of Pickett Downs. Jones reached a tentative agreement with Hagen and Chitwood that the buyers could buy the balance of the subdivision property for $150,000.00 plus the assumption of the mortgage held by New Freedom, which had a balance at that time of approximately $850,000.00. After the agreement was made, Hagen and Chitwood went to New Freedom to verify that New Freedom would permit the assumption of the mortgage, and met with Robert Stone, an officer of New Freedom. Stone stated to Hagen and Chitwood that Jones was about to default on some other loans with New Freedom, in which case all of Jones' loans would be declared in default because they were cross-collateralized, which was erroneous. Stone further told Hagen and Chitwood that New Freedom would be willing to sell Pickett Downs for a discounted price of

$640,000.00, provided Jones received nothing from the transaction.

The discount offered by Stone and the erroneous information about Jones' other loans provided by Stone caused the agreement to fall through, since the buyers could purchase the property from New Freedom after foreclosure at a much lower price. The information concerning Jones' financial condition, the status of his other loans at Freedom, and the discount information offered to Hagen and Chitwood was confidential information which was disclosed without Jones' consent.

B. SEMINOLE FLYING RANCH PROPERTY

On June 5, 1986, Petitioners, Jones, Robert S. Guskiewicz and R.S. Futch, Jr. closed a loan with Freedom in the amount of $7,950,000.00 for the Ranch. This loan was in the form of a two year note with Freedom requiring a one-third profit participation as partial consideration for the making of the loan. In addition, Petitioner, R.S. Futch, Jr., posted with New Freedom a $1,000,000.00 letter of credit as additional collateral.

Although there were several interested buyers in the Ranch property between June 5, 1986, and May 1988, there were no sales because of New Freedom's inability to make decisions without regulatory approval, all of which delayed or prohibited responses to potential purchasers. On March 18, 1988, Jones met with Fred Lazard, an officer of New Freedom. At the meeting, Lazard advised Jones that New Freedom would be interested in allowing an assumption of the Ranch loan by a qualified buyer.

In April of 1988, the Euro-American Investor Group ("Investor Group") expressed an interest to Jones and his partners in purchasing the Ranch. The principals of the Investor Group were Mr. Allen Keen and Mr. Ed Leerdam. After conducting market studies, the Investor Group decided to purchase the Ranch.

On May 20, 1988, a meeting was held between Jones, Leerdam and an officer of New Freedom, Phil Donlevy, to discuss the prospect of the Investor Group assuming the loan of Jones and his partners on the Ranch project. This meeting resulted in a written proposal dated May 23, 1988, from Euro American Investors to New Freedom regarding the assumption of the existing loan. At this meeting, the Investor Group advised Donlevy that it would need to know New Freedom's position regarding assumption of the loan prior to June 15, 1988, which is when Leerdam would be going to Holland to discuss the project with the other investors in the Investor Group. Both Keen and Leerdam were well-known to and highly regarded by the officers of New Freedom and The First, F.A., because they were customers of both institutions. The offer proposed at that time by Keen and Leerdam was a complete assumption of the loan which would result in New Freedom being paid all of the principal on the loan, as well as interest payments. At this point, the Petitioners were out of the picture and further negotiations and communications occurred between New Freedom, the Investor Group and their attorneys.

Donlevy presented the proposal to the local Loan Committee in Winter Park on May 24, 1988, which recommended it to the Senior Loan Committee in Tampa. The Senior Loan Committee subsequently recommended the

proposal to the Board of Directors, although it also formulated a counter-proposal, which was never transmitted to the Investor Group. Donlevy presented the original proposal to New Freedom's Board of Directors on May 27, 1988, and the Board rejected the proposal, made no comment regarding the counter-proposal and decided that an assumption of the loan would not be permitted under any circumstances. Donlevy subsequently contacted Leerdam and informed him of the Board's rejection of the proposal and, without disclosing that no assumption would be permitted, actually solicited a further assumption offer with signed purchase contracts.

Thereafter, the Investor Group expended several thousand dollars to have three purchase contracts drafted. By June 1, 1988, the contracts were executed by the respective Petitioners and the Investor Group. Leerdam then met with Donlevy and Crawford on June 2, 1988, to negotiate the assumption of the loan. At that meeting, the contracts were submitted to Donlevy and to William Crawford, who had assumed the position of Lazard.

On June 3, 1988, a subsequent meeting was held to discuss the assumption of the loan. Leerdam proposed that the Investor Group pay a certain interest rate on the assumption. At the conclusion of this meeting, Donlevy was to review the "numbers" and Crawford was to contact the office of New Freedom in Tampa to determine whether the proposal was acceptable. Crawford was to contact Leerdam later that afternoon with an answer. Leerdam was informed by Crawford that the Executive Vice President of New Freedom, Robert T. Wilhite, could poll the Board of Directors by phone and determine

whether the assumption was acceptable, since the loan was maturing on June 6, 1988. Notwithstanding numerous phone calls from Leerdam, Leerdam did not hear from New Freedom until June 7, 1988, at which time he was informed that New Freedom needed additional time to consider the proposal.

Contrary to what Jones had been told, the purchase contracts submitted to Donlevy and Crawford were never provided to any loan committee or executive officer of New Freedom. Additionally, on June 6, 1988, Donlevy made demand for payment of the $1,000,000.00 letter of credit provided by R.S. Futch, and thereafter packed up all of Petitioners' loan files and sent them to the Special Assets Department.

On June 22, 1988, a meeting was held between New Freedom representatives, the Investor Group, and the Petitioners. At that meeting, it was learned for the first time that the officers, Donlevy, Crawford and Shirek, had known since May 27, 1988, that the Board of New Freedom was unwilling to allow any assumption of the mortgage. Had this information been revealed prior to that time, the Investor Group could have restructured its proposal to consider cash and/or alternate financing so that the mortgage could have been paid at maturity.

The intentional and malicious acts and conduct of Crawford, Donlevy and other New Freedom officials, who were under the direct control of RTC, were committed with the specific intent to destroy the contractual relationship between the Investor Group and the Petitioners, thereby permitting New Freedom to wrongfully call the $1,000,000.00 letter of credit. If New Freedom had acted in good faith, it would have candidly

disclosed that it would not allow an assumption of the loan and allowed the Petitioners to market the property armed with accurate information. The withholding of information and the malicious and intentional misrepresentations, which interfered with the ability of the Petitioners to sell the Ranch and therefore timely pay their obligations to New Freedom, form an important basis of the tort claims asserted by the Petitioners.

In the first lawsuit, Petitioners, Michael D. Jones, Robert S. Guskiewicz, and R. S. Futch, Jr., filed suit against Appellee, Freedom Savings and Loan Association in Case No. 89-207-CIV-ORL-19. The Complaint alleges causes of action against New Freedom for breach of fiduciary duty; intentional and unjustified interference with contractual or business relationships; breach of duty not to disclose information concerning depositor's accounts; negligent misrepresentation and fraud; tortious interference with a business and/or contractual relationship; and a declaratory judgment seeking damages or set-off. In turn, New Freedom filed a Counterclaim for foreclosure.

The second lawsuit was filed by New Freedom on September 1, 1988, against Dunmar Corporation and Michael D. Jones in Case No. 89-205-CIV-ORL-19, for default of a promissory note. Jones filed a Counterclaim for breach of fiduciary duty, intentional interference with a business or contractual relationship and disclosure of confidential information.

The third lawsuit was filed by New Freedom in December 1988, against Petitioners, Lake Pickett, Ltd., and Michael D. Jones as General Partner in Case No.

89-208-CIV-ORL-18, for foreclosure. Petitioners also brought a Counterclaim in this action for the identical tort claims as in Case No. 89-205-CIV-19. All three of these cases were subsequently consolidated by the U.S. District Court.

On or about February 22, 1990, Respondent, New Freedom, filed a Motion for Summary Judgment or in the Alternative Motion for Partial Summary Judgment against Petitioners. The Motion, as set forth in the memorandum of law filed in support of said motion, was *solely* predicated upon 12 U.S.C. § 1823(e) and the doctrine set forth in *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L.Ed. 956 (1942). The RTC simply claimed that it was exempt from the claims of the Petitioners as a matter of law. Under the theory espoused by the RTC, none of the facts adduced by the Petitioners in the record, and none of the facts that the Petitioners **could** adduce at trial in support of their claims, could override the exemption claimed by the RTC. At the time of that motion, the Second Amended Complaint was pending in case number 89-207, and the Second Amended Counterclaim was pending in case number 89-208.

The Petitioners submitted a memorandum in opposition, averring that *D'Oench* did not apply because (a) the Petitioners' tort claims were not within the scope of the *D'Oench* rule, (b) the Petitioners did not allege the enforceability of an "agreement" within the scope of 12 U.S.C. § 1823(e), and (c) *D'Oench* did not apply to conduct which occurred after the formation of New Freedom, i.e., during the period of intensive oversight by federal regulators.

On June 8, 1990, the U.S. District Court entered an Order Granting Partial Summary Judgment against Petitioners. The Court specifically held:

> Because the *D'Oench* doctrine and § 1823(e) bar all of the Jones parties' claims and defenses against RTC, there is no genuine issue of material fact remaining in these consolidated actions regarding liability as between the Jones parties and RTC, and RTC is entitled to judgment as a matter of law on this issue in each case.

On June 15, 1988, the Petitioners filed a Motion for Rehearing/Reconsideration of Order Granting Motion for Summary Judgment or Alternatively Motion for Partial Summary Judgment of Resolution Trust Corporation. On June 29, 1989, the District Court entered an Order denying the Motion for Rehearing/Reconsideration of Order Granting Motion for Summary Judgment or Alternatively Motion for Partial Summary Judgment of Resolution Trust Corporation. On August 15, 1991, the Clerk entered a final judgment in favor of RTC. On August 21, 1991, Petitioner filed a Motion for Rehearing, which was subsequently denied on September 3, 1991. Finally, on September 19, 1991, Petitioners filed their Notice of Appeal of the Final Judgment entered by the District Court to the United States Court of Appeals for the Eleventh Circuit.

In *Jones v. Resolution Trust Corporation*, 7 F.3d 1006 (11th Cir. 1993) (App. B, 32a - 71a), a panel of the Eleventh Circuit Court of Appeals determined that the Petitioners were not seeking in their Complaint to enforce any secret or unwritten "agreement" but rather were seeking relief for independent torts. Therefore, the panel determined that neither the *D'Oench Duhme* Doctrine nor

12 U.S.C. § 1823(e) barred the Appellants' claims and, as a result, the Court reversed the Summary Judgment granted in favor of RTC in its capacity as Receiver for New Freedom with respect to the first five (5) counts of the Complaint.

The Appellees filed with the United States Court of Appeals for the Eleventh Circuit a Motion for Rehearing *En Banc*, which was granted by the Court and the panel decision was vacated. On rehearing *en banc*, the Eleventh Circuit Court of Appeals in *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587 (11th Cir. 1995) affirmed the Summary Judgment rendered by the trial court with respect to all counts of the Complaint. (App. A, 1a - 31a). Instead of dealing with the substantive issues with regard to the applicability of the *D'Oench Duhme* doctrine and 12 U.S.C. § 1823(e) to bar the independent torts asserted by the Appellants, the Eleventh Circuit Court of Appeals in its *en banc* decision sidestepped those issues and instead determined that the Summary Judgment was properly entered because the Appellants had failed to adequately present to the trial court their arguments that their claims were independent torts exempt from *D'Oench Duhme* and 12 U.S.C. § 1823(e).

The basis for federal jurisdiction in the Court of first instance was 28 U.S.C. § 1331 and 1441, and 12 U.S.C. § 1730(K)(1)(C).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW PRESENTS TWO IMPORTANT ISSUES OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT: THE INDEPENDENT TORT EXCEPTION TO THE BAR OF D'OENCH, DUHME DOCTRINE AND 12 U.S.C. § 1823(e) IS NOT LIMITED TO ACTIONS UNRELATED TO ORDINARY BANKING TRANSACTIONS, AND NEITHER THE D'OENCH, DUHME DOCTRINE NOR 12 U.S.C. § 1823(e) BARS CLAIMS WHICH DO NOT SEEK TO DIMINISH OR DEFEAT SPECIFIC ASSETS OF A FAILED INSTITUTION.

In accordance with Rule 10.1(e), Rules of the Supreme Court of the United States, Petitioners submit that the lower court has decided two important issues of federal law which have not been, but should be, settled by the Court. First, the Eleventh Circuit has placed an overly restrictive interpretation upon the "independent tort" exception to the *D'Oench, Duhme* doctrine, and the Court has not had occasion to set the parameters of that particular line of cases. Second, the Eleventh Circuit has placed an unduly expansive interpretation of the term "asset" as referenced in 12 U.S.C. 1823(e), so that this term will refer to the general assets of a failed financial institution.

This case addresses policy considerations in limiting, or permitting, tort claims to be made against the receiver of a failed, federally insured institution. Since this Court's decision in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), Congress and Federal courts have severely inhibited plaintiffs' recourse against the receivers of failed institutions. These limitations are rooted in the perceived utility of enhancing the reliability

of regulatory auditing of financial institutions. In theory, the *D'Oench, Duhme* doctrine discourages bank customers from engaging in unconventional transactions that would deceive bank customers.[1] The practical effect of the *D'Oench* doctrine and 12 U.S.C. 1823(e) is that a party may not pursue a claim against a receiver of a failed financial institution unless that party has a formal, signed agreement with the failed institution.

Notwithstanding these general policies, appellate courts have applied a competing principle that innocent customers should not suffer at the hand of unscrupulous bankers. Under various theories, courts have made exceptions to the *D'Oench* doctrine on an essentially *ad hoc* basis. For example, courts have previously suggested that where a customer is wholly innocent in forming a contract with a failed institution, but the contract technically violates the *D'Oench* doctrine, the borrower does not forfeit his or her rights against the failed institution. *E.g., FDIC v. Meo*, 505 F.2d 790 (9th Cir. 1974).

In more recent years, federal courts have struggled with what is referred to as the "independent tort" exception to the *D'Oench* doctrine. This case summarizes the conflict between the federal policies underlying the *D'Oench* doctrine, and the principle that innocent parties

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[1] "The test is whether the note was designed to deceive the creditors or the public authority or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which the respondent relied in insuring the bank was or was likely to be misled." *D'Oench*, 315 U.S. at 460.

should have full recourse against the misconduct of a failed institution.

> The D'Oench Duhme doctrine simply forbids fabrication of fictitious assets for inclusion in the accounts receivable portfolio of regulated financial institutions tending to mislead and deceive bank examiners in their investigations to determine the financial condition of such institutions. That doctrine affords no protection against tort claims against a financial institution, whether for personal injuries to a motorist in a collision with an armored car bringing money to the S. & L. office, or for insider profits in a sale of securities violating Securities and Exchange regulations, or for fraudulently entering into transactions involving discriminatory interest rates . . . . *Astrup v. Midwest Federal Savings Bank*, 886 F.2d 1057, 1059-60 (8th Cir. 1989).

The savings and loan crisis has afforded federal courts with a number of opportunities to define the outer boundaries of the *D'Oench* doctrine, based upon the sheer number of failed financial institutions. At the same time, state courts expanded theories of lender liability, altering the way the common law perceived the relationship between borrowers and lenders. In this setting, *Astrup* was an easy case because the *D'Oench* policies would simply not be advanced by barring the borrower's claims. Because there was simply no way for a bank examiner to audit such a tort claim , or to project the effects of the claim upon the bank's solvency, the claim did not threaten the accuracy of federal bank examinations.

The case before the Court is not unlike *Astrup*. The gravaman of the Petitioners' claims is that officers of New

Freedom, under control by the federal regulators, engaged in efforts to "scuttle" the sale of certain properties owned by the Petitioners. There is simply no way for federal examiners to determine the prospective liability of the institution if bank officers engaged in a nefarious scheme to interfere with the borrowers' sale of the properties. That is not the kind of thing New Freedom would reduce to a written agreement or document in the minutes of its Board of Directors.

The approach of the Eleventh Circuit, in its *en banc* opinion, overly simplifies the policies advanced by the *D'Oench* doctrine and may be summarized as follows:

> [T]he claims involved in this case related directly to ordinary banking transactions, i.e., the rights and obligations relating to the issuance of the letter of credit by the bank. Banking examiners who inspect and evaluate the bank records reasonably expect the records of regular banking transactions to reflect all of the rights and liabilities of the bank regarding such regular banking transactions.

Resolution Trust Corp. v. Dunmar Corp., 43 F.3d. 587, 594 (11th Cir. 1995), quoting *OPS Shopping Ctr., Inc. v. FDIC*, 922 F.2d 306, 310 (11th Cir. 1993). However, in *OPS*, the court addressed a fraudulent scheme to obtain and enforce a letter of credit issued by a failed institution, where there was no record whatsoever of the letter of credit in the banking records. This was precisely the type of scheme which the Court in *D'Oench, Duhme* expressly condemned.

In contrast, allowing the Petitioners recourse, in a tort action, will not violate any of the policy concerns of

the *D'Oench* court. As a matter of principle, the Petitioners deserve their day in court to obtain recourse for the wrongs committed against them by New Freedom. Unlike *OPS*, there is no conflict between this principle and the policies underlying the *D'Oench* doctrine.

The present case shows that the Eleventh Circuit's analysis unnecessarily violates the rights of parties suffering wrongs at the hands of such financial institutions. Because the wrongs committed by New Freedom had something to do with a mortgage loan acquired from the failed Freedom, the Eleventh Circuit's approach would bar such claims because a mortgage loan is a "regular banking transaction". This approach misses the point entirely. The conduct of the bankers in question, in deviously attempting to harm the efforts of the Petitioners to market their properties, was highly irregular. Customers of New Freedom should not suffer merely because the irregular conduct had something to do with a "regular" business transaction. For these reasons, the Eleventh Circuit's over-simplified analysis of the "independent tort" exception to the *D'Oench* doctrine should be disregarded by this Court.

As the Eleventh Circuit recognized in its *en banc* opinion, the common law *D'Oench* doctrine is applied in tandem with 12 U.S.C. 1823(e), so that the same analysis should be employed in interpreting the statute and the common law doctrine. The United States Supreme Court has interpreted 12 U.S.C. 1823(e) to place a broad interpretation upon the term "agreement" as employed in that statute, to include fraudulent representations made for the purposes of inducing the execution of a note. *Langley v. FDIC*, 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987).

However, the Court has not had occasion to interpret the term "asset" in the first paragraph of that statute, leading to the question: does *D'Oench* apply to protect all assets of a failed financial institution, or merely claims and defenses directed to the validity of a specific loan asset? Congress clearly intended the latter interpretation of the statute. *See In Re NBW Commercial Paper Litigation*, 826 F.Supp. 1448, 1463-64 (D. D.C. 1992); *Agri Export Co-op v. Universal Sav. Ass'n.*, 767 F.Supp. 824, 833 (S.D. Tex 1991), modified, 780 F.Supp. 1466 (S.D. Tex 1991). Otherwise, any claim made against the institutions such as New Freedom, which were established to acquire assets of failed institutions, would, if proven, tend to diminish such assets.

In light of the fact that 12 U.S.C. 1823(e) is read in tandem with the common law *D'Oench* doctrine, the Eleventh Circuit has wrongly repudiated its previous position that "we simply do not think the D'Oench doctrine operates to bar free standing tort claims that are not related to a specific asset acquired by the FDIC". *Vernon v. FDIC*, 981 F.2d 1230, 1233-34 (11th Cir. 1993). Neither the common law *D'Oench* doctrine, nor its statutory counterpart, should apply where the plaintiff's claim is not "related to", and does not challenge the validity of, a loan asset acquired by the failed institution. This approach would, in lieu of the "ordinary banking transaction" test presently adopted by Eleventh Circuit, advance the policies of the *D'Oench* doctrine while, at the same time, advancing the meritorious policy that innocent parties deserve full recourse against the assets of a failed institution.

CONCLUSION

The decision below presents important unanswered questions about the independent tort exception to the *D'Oench, Duhme* doctrine and 12 U.S.C. § 1823(e). For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX A – JANUARY 26, 1995 ELEVENTH CIRCUIT DECISION

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3924

RESOLUTION TRUST CORP.,

Plaintiff,

versus

DUNMAR CORP.,
MICHAEL D. JONES,

Defendants-Counterclaim
Plaintiffs,

versus

THE FIRST F.A.,

Defendant-Counterclaim Defendant,

SHERMAN DANTZLER
JACK SHIREK,

Defendants,

and

THE FIRST, F.A. OF ORLANDO,
RESOLUTION TRUST CORP.,

Counter-Defendants.

MICHAEL D. JONES,
ROBERT S. GUSKIEWICZ,
R.S. FUTCH, JR.,

Plaintiffs-Appellants,

versus

RESOLUTION TRUST CORP.,

Defendant-Third Party
Plaintiff-Appellee.

PHILIP DONLEVY,
WILLIAM CRAWFORD,
ROBERT STONE,

Defendants,

versus

SEMINOLE FLYING AND
SOARING, INC.,
THE FIRST, F.A. OF ORLANDO,

Third Party
Defendants.

RESOLUTION TRUST CORP.,

Plaintiff-Counter-
Defendant-Appellee,

versus

LAKE PICKETT, LTD., A
FLORIDA LIMITED PARTNERSHIP,
MICHAEL D. JONES, AS GENERAL
PARTNER, D/B/A LAKE PICKETT,
LTD., A FLORIDA LIMITED PARTNERSHIP,
MICHAEL D. JONES, INDIVIDUALLY
AND AS TRUSTEE,

Defendants-Counter-
Plaintiffs-Appellants.

THE FIRST, F.A. OF
ORLANDO,

Defendant.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges.

ANDERSON, Circuit Judge:

I. INTRODUCTION

In this decision, we assess the propriety of the district court's grant of summary judgment in favor of appellee Resolution Trust Corporation based upon the *D'Oench, Duhme* doctrine. For the reasons that follow, we affirm the judgment of the district court.

II. FACTS

This case arises from the banking relationship of Michael D. Jones, Robert A. Guskiewicz, R.S. Futch, Jr., and Lake Pickett, Ltd. (collectively "Jones") with the financial institution of Freedom Savings & Loan Association ("Freedom"). Beginning in 1979, Jones obtained several personal and business loans from Freedom, two of which are at issue here. First, Jones obtained a loan secured by a mortgage on a residential real estate development known as Pickett Downs ("Lake Pickett"). Jones executed a two-year note and mortgage on Lake Pickett on July 11, 1984 for a total indebtedness of $1,600,000. With an unpaid balance of $1,117,172, the parties executed an extension agreement which delayed the loan's payoff until July 1987. Second, Jones obtained a loan for which the collateral consisted of property which Jones

and his partners intended to develop as a "fly-in" residential community with an airstrip ("Airport Property"). The parties executed a two-year note and mortgage on the Airport Property on June 5, 1986 in the amount of $7,950,000. At the time of the alleged incident which spawned this litigation, Jones still owed Freedom substantial sums on both obligations. Jones owed a total of more than $8,000,000, with approximately $850,000 due on the Lake Pickett obligation and over $7,400,000 due on the Airport Property loan. Both loans were evidenced by a standard note and mortgage. Pursuant to both loan agreements, Jones could not effectuate an assumption of the obligations without the prior consent of Freedom.

On July 23, 1987, the Federal Home Loan Bank Board ("FHLBB") declared Freedom insolvent and appointed the Federal Savings & Loan Insurance Corporation ("FSLIC") as the institution's Receiver. The FHLBB chartered a new federal savings and loan institution with the same name ("New Freedom") to which the FSLIC transferred assets of Freedom, including the loans at issue, pursuant to an acquisition agreement.

During the operation of New Freedom, the incidents at issue in this case occurred. With respect to each of the properties, negotiations occurred between and among Jones, potential buyers, and New Freedom officials in an effort to restructure the loans. In each case, Jones had reached an agreement with buyers to purchase his land, the collateral. With respect to the Airport Property, interested buyers submitted a written proposal of the deal to New Freedom. In both cases, the arrangement between Jones and the buyers required assumption of the existing

loans; thus, the transactions required New Freedom's approval.

Jones asserts that during such negotiations, New Freedom officials made oral representations that the bank would lend additional monies, extend the time for payment, and permit assumption by the buyers. Jones asserts that New Freedom intentionally and/or negligently killed Jones' arrangement with the buyers, accordingly damaging Jones due to the failure of the deals to be consummated.

III. PROCEEDINGS BELOW

After the foregoing negotiations surrounding the Airport Property broke down, Jones instituted an action in state court against New Freedom and various officers, raising a number of tort theories. new Freedom responded by counterclaiming to foreclose the Airport Property and by instituting foreclosure proceedings on the Lake Pickett Property. Prior to resolution of these cases, on February 7, 1989, FHLBB declared New Freedom insolvent and appointed FSLIC as Conservator. Subsequently, on March 8, 1989, FSLKI removed these cases to federal court. Pursuant to the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L. 101-73, 103 Stat. 183, § 1821(d)(2)(A)(i), (FIREA) the Resolution Trust Corporation ("RTC") was created, replacing the dissolved FHLBB and FSLIC The RTC as Receiver for New Freedom occupies New Freedom's place with respect to Jones' claims against the failed

institution. The RTC in its corporate capacity, as purchaser of New Freedom's assets, undertakes the claims against Jones on the notes.

Following discovery, the RTC moved for summary judgment. After Jones' response and full briefing, the district court granted summary judgment in favor of RTC. On appeal, a panel of this court affirmed in part and reversed in part. *Resolution Trust Corp. v. Jones*, 7 F.3d 1006 (11th Cir.1993). RTC's petition for en banc rehearing was granted, thus vacating the panel opinion. 20 F.2d 397 (11th Cir.1994).

RTC's motion for summary judgment argued that all of Jones' claims were based on oral agreements or representations and thus were barred by *D'Oench*. Jones filed a brief and response in opposition to summary judgment. *See* Memorandum of Law Opposing Motion for Summary Judgment or, Alternatively, Motion for Partial Summary Judgment (hereinafter "Memorandum of Law Opposing Motion for Summary Judgment") R-2-68-1. The first argument Jones raised to the district court, entitled "Dual Capacity," has not been pursued on appeal and thus is deemed abandoned. The third argument Jones raised, "Dominion and Control," is clearly without merit and warrants no further discussion.[1] Thus, we address

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[1] With respect to this dominion and control argument, the district court noted that the wrongs complained of by Jones were not alleged to have been committed by the RTC itself but rather by the employees of New Freedom who were subject to the oversight and control of the federal regulatory authority. The panel opinion, in rejecting this dominion and control argument, noted that under 12 U.S.C. § 1821(n)(6)(A) ("A bridge

Jones' second argument, namely that *D'Oench* does not apply to bar tort claims involving oral agreements that additional monies could be loaned, that extensions could be granted, and that the bank would permit assumption of the mortgage. Jones' brief to the district court argued:

> Although the affirmative defenses allege oral agreements that additional monies could be loaned, that extensions could be granted and that New Freedom would be willing to allow an assumption of the loan to a qualified buyer, these agreements do not tend to diminish the rights of the corporation, RTC.

Memorandum of Law Opposing Motion for Summary Judgment, R-2-68-16. We further address a question implicit in this argument; i.e., that Jones' claims somehow do not diminish the rights of RTC.[2] For the reasons set forth below, we conclude that Jones' claims are barred.

IV. STANDARD OF REVIEW

In assessing a grant of summary judgment, this court conducts a *de novo* review, applying "the same legal standards 'that should have been applied by the district court.' " *Brown v. Crawford*, 906 F.2d 667, 669 (11th Cir.) (quoting *Hiram Walker & Sons, Inc. v. Kirk Line*, 877 F.2d

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bank is not an agency, establishment, or instrumentality of the United States"), the RTC regulators cannot be held vicariously liable for the acts of the bridge bank's employees.

[2] We address only these arguments. We decline to address other arguments which were not fairly presented to the district court in opposing summary judgment. Jones raises these arguments for the first time on appeal, indeed, for the first time in brief to the en banc court. *See* Part V.C. of this opinion.

1508, 1513 (11th Cir.1989)), *cert. denied*, 500 U.S. 933, 111 S.Ct. 2056, 114 L.Ed. 461 (1991). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In opposing a motion for summary judgment, "a party may not rely on his pleadings to avoid judgment against him." *Ryan v. Int'l Union of Operating Eng'rs, Local 675*, 794 F.2d 641, 643 (11th Cir.1986); *see also Bennett v. Parker*, 898 F.2d 1530, 1532 n. 1 (11th Cir.) *cert. denied*, 498 U.S. 1103, 111 S.Ct. 1003, 112 L.Ed.2d 1085 (1991). Forbidding reliance upon pleadings precludes a party from "choos[ing] to wait until trial to develop claims or defenses relevant to the summary judgment motion." *Golden Oil Co., Inc. v. Exxon Co., U.S.A.*, 543 F.2d 548, 551 & n. 3 (5th Cir.1976).[3] This effectuates the purpose of summary judgment which " 'is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " *Wouters v. Martin County*, 9 F.3d 924, 928 (11th Cir.) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)), *cert. denied*, ___ U.S. ___, 115 S.Ct. 65, 130 L.Ed.2d 21 (1994). Thus, "mere general allegations which do not reveal detailed and precise facts" will not prevent the award of summary judgment upon a court's determination that no genuine issue for trial exists. *Franz Chem. Corp. v. Phila. Quartz Co.*, 594 F.2d 146, 150 (5th Cir.1979).

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

V. DISCUSSION

Our analysis begins with an examination of the *D'Oench* doctrine's origins and with the leading case itself, *D'Oench, Duhme & Co., v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). In that case, a bank, which subsequently failed, tried to collect a debt that was evidenced by a writing. The defendant asserted that it had made a secret side agreement with the bank, in which the bank promised not to collect the debt. The Supreme Court held that such a "secret agreement" outside the documents contained in the bank's records would not operate as a defense against suit by the FDIC on a note acquired from a failed bank. *Id.* at 459, 62 S.Ct. at 680. The Court based its holding on provisions of the Federal Reserve Act which "reveal[ed] a federal policy to protect [the FDIC] . . . and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] . . . insures or to which it makes loans." *Id.* at 457, 62 S.Ct. at 679. Accordingly, the Court articulated an inquiry to estop certain borrower defenses:

> The test is whether the note was designed to deceive the creditors or the public authority or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled.

Id. at 460, 62 S.Ct. at 681.

Congress has embodied the *D'Oench* estopped doctrine in a statute which was initially codified by the

Federal Deposit Insurance Act of 1950, § 2[13](e), 64 Stat. 889, and as amended, 12 U.S.C. § 1823(e), provides as follows:

> No agreement which tends to diminish or defeat the interest of the Corporation [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement –
>
> (1) is in writing
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution.
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1823(e).

Since the passage of FIRREA, this provision also applies to the RTC. *See* 12 U.S.C. § 1441a(b)(4). Prior to FIRREA's passage, courts had determined that the purposes underlying the *D'Oench* doctrine and § 1823(e) were the same, thus permitting utilization of the same analysis under each. *See Baumann v. Savers Fed. Sav. & Loan Ass'n*, 934 F.2d 1506, 1515 (11th Cir.1991), *cert. denied*, ___ U.S. ___ , 112 S.Ct. 1936, 118 L.Ed.2d 543 (1992); *Twin*

Const. Inc. v. Boca Raton, Inc., 925 F.2d 378, 382 & n. 2 (11th Cir.1991); *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1105 (11th Cir.1990). Accordingly, cases interpreting the common law doctrine as well as its statutory counterpart are applicable precedent. *Baumann*, 934 F.2d at 1515.

Re-examination and elaboration of the *D'Oench* doctrine have expanded it far "beyond the factual background of the *D'Oench* case itself, so that it 'now applies in virtually all cases where a federal depository institution regulatory agency is confronted with an agreement not documented in the institution's records.' " *OPS Shopping Center, Inc. v. FDIC*, 992 F.2d 306, 308 (11th Cir.1993) (quoting *Baumann*, 934 F.2d at 1510). This circuit's *D'Oench* rule, as articulated in *Baumann* and reiterated in *OPS* provides:

> In a suit over the enforcement of an agreement originally executed between an insured depository institution and a private party, a private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records.

OPS, 992 F.2d at 308 (quoting *Baumann*, 934 F.2d at 1515).

Memorialization of agreements best serves the dual policies underlying the *D'Oench* doctrine which the Supreme Court set forth in *Langley v. FDIC*, 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987). First, application of the *D'Oench* doctrine permits federal and state bank examiners to rely upon the bank's records of regular banking transactions in evaluating the institution's fiscal

soundness. *Id.* at 91, 108 S.Ct. at 401. Particularly where the FDIC is deciding whether to liquidate a failed bank, determinations must be made "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services." *Id.* (quoting *Gunter v. Hutcheson*, 674 F.2d 862, 865 (11th Cir.), *cert. denied*, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982)). Second, requiring that agreements be executed and become regular banking records is designed to "ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." *Langley*, 484 U.S. at 91, 108 S.Ct. at 401. Finally, where one lends oneself to a scheme or arrangement whereby the banking authority is likely to be misled, that scheme or arrangement should not be the basis for a claim against the banking authority. *Id.* at 92-93, 108 S.Ct. at 402.

A. *Applicability Generally of the D'Oench bar to Jones' Tort Claims*

We turn first to Jones' argument that the *D'Oench* doctrine does not bar his tort claims – claims which allege oral agreements that additional monies could be loaned, that extensions could be granted, and that the bank would permit assumption of the mortgage by a qualified buyer. We reject this argument. The law is well-established that *D'Oench* bars tort claims based upon such oral agreements. The Supreme Court in *Langley* applied section 1823(e) to bar a claim based upon an oral misrepresentation, notwithstanding the fact that the claim

sounded in tort. The alleged fraudulent misrepresentation occurred during discussions surrounding an ordinary banking transaction which culminated in a land purchase, a note and a mortgage. 484 U.S. at 89, 108 S.Ct. at 400. Similarly, in this case, the misconduct of which Jones complains involves negotiations and discussions concerning the bank's approval of persons or entities to assume part of Jones' mortgage indebtedness. The background of Jones' claim is that Jones wanted to sell the property to escape the burden of the debt, that Jones had potential purchasers who were willing to assume Jones' indebtedness, and that certain concessions by the bank were needed, including in particular the bank's approval of the assumption by the potential purchasers. As in *Langley*, the instant tort claims are based upon oral representations which Jones asserts led him to believe New Freedom would permit assumption of his mortgage indebtedness. Therefore, where, as here, a tort claim arises in the course of regular banking transactions, such that exclusions of the alleged "secret agreement" accords with the underlying policies of *D'Oench* set forth in *Langley*, that claim is barred.

Like *Langley*, this circuit's decisions recognize that tort claims arising from oral side agreements are barred. In *FDIC v. Govaert (In re Geri Zahn, Inc.)*, 25 F.3d. 1539 (11th Cir.1994), this court held that *D'Oench* barred claims of fraud, wrongful dishonor, and intentional interference with a business relationship where the alleged misrepresentations implicated an oral side agreement reached during the loan negotiations which contradicted the express terms of the loan documentation. The court rejected the position that a tort claim could be maintained

where the written loan terms allegedly did not reflect the parties' true agreement with respect to the date of the note and the time of funding. *Id.* at 1544. In concluding that the tort claims at issue fell within the core of the *D'Oench* bar, the court reasoned that such oral agreements were "part and parcel" of the loan negotiations, and as such would normally be reflected in the records of regular banking transactions. *Id.* Similarly, in this case, had the bank approved the assumptions Jones requested, that information would have been reflected in the minutes of the board of directors' meeting and would have been embodied in a written agreement.

Also relevant is this circuit's holding in *OPS Shopping Ctr., Inc. v. FDIC*, 992 F.2d 306 (11th Cir.1993). In *OPS*, a bank refused to pay on a letter of credit not reflected in the bank's files, records, or board of directors' minutes; the plaintiff sued for non-payment. In deciding that *D'Oench* barred plaintiff's claims against the FDIC, the court extensively discussed the circuit's prior decision in *Vernon v. FDIC*, 981 F.2d 1230 (11th Cir.1993),[4] (*Vernon II*) particularly the scope of free-standing torts which *Vernon II* described. First, the *OPS* court set forth a critical proposition: " 'a private party may not enforce against a federal deposit insurer any obligation *not specifically memorialized* in a written document such that the agency would be aware of the obligation when conducting an

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[4] In *Vernon II*, the court permitted assertion of a tort claim, but that claim involved alleged violations of securities laws and related claims arising from the claimants' purchase of preferred stock and warrants to purchase common stock in the failed institution itself.

examination of the institution's records.' " *OPS*, 992 F.2d at 308 (emphasis added) (quoting *Baumann v. Savers Fed. Sav. & Loan Ass'n*, 934 F.2d 1506, 1515, *cert. denied*, ___ U.S. ___, 112 S.Ct. 1936, 118 L.Ed.2d 543 (1992)). Second, the *OPS* court rejected the assertion that *D'Oench* applied only to transactions relating to a specific asset of the bank. Although the court acknowledged that some language in *Vernon II* would seem to suggest that the *D'Oench* doctrine would bar only tort claims related to a specific asset of the bank, the court promptly refuted that contention by distinguishing the free standing tort claims at issue in *Vernon II* from the claims at issue in *OPS*:

> [8] [T]he claims involved in this case relate directly to ordinary banking transactions, i.e., the rights and obligations relating to the issuance of a letter of credit by the bank. Banking examiners who inspect and evaluate the bank records reasonably expect the records of regular banking transactions to reflect *all* of the rights and liabilities of the bank regarding such regular banking transactions.

Id. at 310 (emphasis in original or added).

Thus, the court distinguished between typical claims like employment discrimination and automobile accidents which would be free-standing torts not barred by *D'Oench*, and those relating to "ordinary banking transactions." *Id.* As to the latter, the court found that *Vernon II* concept of freestanding tort claims did not encompass claims which relate directly to regular banking transactions, memorialization of which should be reflected in regular banking records. *Id.* at 311. Thus, *OPS* holds that

D'Oench bars a claim or defense not found in the bank's records that involves regular banking transactions.

It is readily apparent from the case law that Jones' claims must fail. Jones' claims – that additional monies could be loaned, that extensions could be granted, and that assumption would be permitted – arises out of alleged oral agreements or representations; none is memorialized in any written document; yet the nature of each alleged oral agreement or representation relates to regular banking transactions and should have been documented in the bank records. For example, reduced to its basic elements, Jones' claim regarding the Airport Property is a claim on the bank's oral promise to permit assumption of the loan by the potential purchasers Jones had located. Such an obligation, unlike one arising from an automobile accident, is one which certainly could have, and should have, been documented in the bank's records of regular banking transactions. Jones' failure to acquire some written evidence of this oral promise is proof that he lent himself to an arrangement which was likely to mislead.

Other circuits have also squarely rejected the position which Jones advocates and have applied *D'Oench* to bar tort claims arising from oral agreements. As articulated by the First Circuit:

> This conclusion is not altered by the fact that some of the claims asserted by Timberland sound in tort. The district court correctly held that *D'Oench* bars defenses and affirmative claims whether cloaked in terms of contract or tort, as long as those claims arise out of an

> alleged secret agreement. . . . To allow the plaintiff to assert tort claims based on the oral agreement would circumvent the very policy behind *D'Oench*, and therefore, *D'Oench* is generally said to apply to tort claims. *See Beighley [v. Federal Deposit Insurance Corp.]*, 868 F.2d [776] at 784 [(5th Cir. 1989)]. Although not decided under *D'Oench*, the Supreme Court's decision in *Langley v. F.D.I.C.* supports this conclusion by holding that § 1823(e) bars fraud claims that are premised upon an oral agreement. 484 U.S. 86, 93, 108 S.Ct. 396, 402, 98 L.Ed.2d 340 (1987). We therefore conclude that *D'Oench* applies with equal force to tort claims arising out of secret agreements.

Timberland Design, Inc. v. First Serv. Bank for Sav., 932 F.2d 46, 50 (1st Cir.1991) (footnotes omitted). The tort claims asserted in *Timberland* (negligent misrepresentation, deceit, and breach of fiduciary duty) arose out of negotiations concerning additional loans, a context analogous to the claims in this case.

Several other courts have held that *D'Oench* bars tort claims in similar situations. *See Robinowitz v. Gibraltar Sav.*, 23 F.3d 951 (5th Cir.1994) (*D'Oench* barred tort claims of breach of fiduciary duty, fraud, and misrepresentation where claims arose out of alleged oral misrepresentations arising from settlement agreement of joint venture); *FDIC v. Bathgate*, 27 F.3d 850 (3d Cir.1994) (*D'Oench* barred defenses of breach of agreement, breach of duty of good faith, wrongful acceleration, trade libel/slander of credit, slander of title, and impairment of collateral where claims were predicated on side agreement during negotiations with bank to extend closing date set forth in letter); *FDIC v. Hulsey*, 22 F.3d 1472 (10th Cir.1994) (*D'Oench* barred

counterclaims of fraud/intentional misrepresentation, constructive fraud/breach of fiduciary duty, and negligence to extent based on oral agreements surrounding loan transfer agreement prior to transfer to FDIC); *Lemaire v. FDIC,* 20 F.3d 654 (5th Cir.1994) (*D'Oench* barred claims predicated on bank officer's oral promise to make loan); *FDIC v. Marine Midland Realty Credit Corp.,* 17 F.3d 715 (4th Cir.1994) (noting in dicta that *D'Oench* bars claims or defenses based on unwritten agreements); *Hanson v. FDIC,* 13 F.3d 1247 (8th Cir.1994) (tort actions based upon oral side agreements are barred); *McCullough v. FDIC,* 987 F.2d 870 (1st Cir.1993) (*D'Oench* barred claims that bank liable for failing to disclose order requiring removal of hazardous waste from property); *Castleglen, Inc. v. Resolution Trust Corp.,* 984 F.2d 1571 (10th Cir.1993) (*D'Oench* barred tort claim arising out of misrepresentations made during contract negotiations); *Bruneau v. FDIC,* 981 F.2d 175 (5th Cir.) (barring claims for breach of fiduciary duty and "concerted tort action" where claims predicated on oral representations that depositor's accounts were fully insured), *cert. denied,* ___ U.S. ___, 113 S.Ct. 2413, 124 L.Ed.2d 636 (1993); *FDIC v. Payne,* 973 F.2d 403 (5th Cir.1993) (*D'Oench,* barred claim of fraudulent inducement based on bank's oral misrepresentation about financial condition of person Payne agreed to guarantee); *In re 604 Columbus Ave. Realty Trust,* 968 F.2d 1332 (1st Cir.1992) (tort claims based on illegal kick back scheme barred by *D'Oench*); *Oliver v. Resolution Trust Corp.,* 955 F.2d 583 (8th Cir.1992) (*D'Oench* barred tort claim for breach of fiduciary duty based on violation of oral side agreements regarding loan); *FDIC v. Kasal,* 913 F.2d 487, 493 (8th Cir.) (dismissing counterclaims of

breach of contract, negligence, promissory estoppel, and misrepresentations because based upon a secret unwritten side agreement), *cert. denied*, 498 U.S. 1119, 111 S.Ct. 1072, 112 L.Ed.2d 1178 (1991); *Mainland Sav. Ass'n v. Riverfront Assocs., Ltd.*, 872 F.2d 955 (10th Cir.) (defenses based upon side agreement to find a second loan not evidenced in banks barred), *cert. denied*, 493 U.S. 890, 110 S.Ct. 235, 107 L.Ed.2d 186 (1989); *Beighley v. FDIC*, 868 F.2d 776 (5th Cir.1989) (*D'Oench* barred breach of fiduciary duty claim arising out of bank's alleged oral agreement to finance the purchase of collateral property).

B. Jones Second Issue

We now turn to the second issue – whether Jones' claims can escape the *D'Oench* bar because they somehow do not diminish the rights of RTC. Jones makes several apparently related arguments: that his claims do not directly challenge the validity or enforceability of RTC's note, that his claims do not tend to diminish the rights of the corporation (RTC), and that the *D'Oench* doctrine protects the RTC only in its corporate capacity and not in its receivership capacity. Although it is difficult to ascertain precisely what Jones' argument means, we address the two possible interpretations which we can divine. First, Jones' may mean to suggest that although the *D'Oench* doctrine bars his claims against the note itself, which RTC assumed in its corporate capacity, the *D'Oench* doctrine does not apply to protect the RTC in its receivership capacity, i.e., in its capacity standing in the shoes of the failed bank. However, every circuit which has addressed this issue, including the Eleventh Circuit, has held that the *D'Oench* doctrine protects the RTC not only

in its corporate capacity but also in its receivership capacity.[5] Thus we reject this interpretation of Jones' argument as being wholly without merit.

The other possible interpretation of Jones' argument is as follows: while conceding that RTC may collect on the note and foreclose on the mortgage, without the interference of Jones' defenses, Jones' may be arguing that he

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[5] This circuit has held:

> [T]he reasoning behind *D'Oench, Duhme* requires that it be applied to protect the FDIC and FSLIC regardless whether the regulatory body is acting in its capacity as a receiver or as a corporate insurer. *FSLIC v. Two Rivers Assocs., Inc.*, 880 F.2d 1267, 1277 (11th Cir. 1989). Other decisions of this circuit are in accord. *See FDIC v. McCullough*, 911 F.2d 593 (11th Cir. 1990), *cert. denied*, 500 U.S. 941, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991); *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101 (11th Cir. 1990). Several other circuits have squarely held that the *D'Oench* doctrine applies to the FDIC in its capacity as receiver. *See Oklahoma Radio Associates v. FDIC*, 987 F.2d 685 (10th Cir. 1993); *Timberland Design, Inc. v. First Serv. Bank for Savings*, 932 F.2d 46 (1st Cir. 1991); *FDIC v. McClanahan*, 795 F.2d 512 (5th Cir. 1986); *FDIC v. First National Finance Co.*, 587 F.2d 1009 (9th Cir. 1978).
>
> Other circuits, without expressly addressing the issue, have applied the *D'Oench* rule where the FDIC was acting in its receiver capacity. *See FDIC v. Hadid*, 947 F.2d 1153 (4th Cir. 1991); *FDIC v. Bernstein*, 944 F.2d 101 (2d Cir. 1991); *FDIC v. Wright*, 942 F.2d 1089 (7th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1937, 118 L.Ed.2d 544 (1992); *Adams v. Madison Realty & Development, Inc.*, 937 F.2d 845 (3d Cir. 1991); *First State Bank v. City and County Bank*, 872 F.2d 707 (6th Cir. 1989); *Firstsouth, F.Z. v. Aqua Constr., Inc.*, 858 F.2d 441 (8th Cir. 1988).

can, nevertheless, sue on his claims and impose liability on RTC which could then be set-off against the RTC's recovery on the note.[6]

However, the case law does not impose this narrow limitation on the application of the *D'Oench* doctrine. Were it otherwise, an obligor could accomplish indirectly what *D'Oench* expressly prohibits, enforcement of an unwritten agreement. In declining to reach a related issue, this court in *FDIC v. Lattimore Land Corp.*, 656 F.2d 139 (5th Cir.1981) nevertheless noted:

> [A]n assertion of this defense against the FDIC seems merely to convert a claim of breach into a claim of fraud. If an obligor may successfully void a note and recoup damages against the FDIC based on a claim of fraudulent inducement from an unwritten agreement, he will have made an end run around § 1823(e) by asserting as fraudulent the same unwritten agreement of which a breach resulting in damages may not under § 1823(e) be asserted against the FDIC.

Id. at 146 n. 13. Indeed, in *OPS*, this court squarely rejected the contention that *D'Oench* applies only to bar claims which are related to specific assets, like a note. *OPS Shopping Ctr., Inc. v. FDIC*, 992 F.2d 306, 309-10 (11th Cir.1993).[7] *See Timberland Design, Inc. v. First Service Bank*

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[6] There would be the practical difference that the amount of the set-off would probably be less than the full amount of the note (the pro rata share of the assets of the failed institution likely being less than 100%).

[7] Dicta in *Vernon v. FDIC*, 981 F.2d 1230, 1233-34 (11th Cir. 1993), could have been interpreted to suggest that *D'Oench* applies only to claims which directly challenge the validity of a

for Savings, 932 F.2d 46, 49-50 (1st Cir.1991) (*D'Oench* protects the FDIC from Timberland's affirmative claims which are based upon an alleged oral agreement to lend money in the future); *Hall v. FDIC*, 920 F.2d 334, 339 (6th Cir.) (*D'Oench* doctrine held to protect the FDIC even where the FDIC does not have "an interest in an asset"), *cert. denied*, 501 U.S. 1231, 111 St.Ct. 2852, 115 L.Ed.2d 1020 (1991); *Bowen v. FDIC*, 915 F.2d 1013, 1016 (5th Cir.1990) (applying *D'Oench* and holding that the "agreement need not implicate a specific obligation, such as a note or other asset held by the FDIC"); *Bell & Murphy & Assocs., Inc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 753 (5th Cir.) (rejecting argument that *D'Oench* "bars only claims or defenses based upon unrecorded side agreements that defeat the FDIC's interest in a *specific asset* acquired from a bank"), *cert. denied*, 498 U.S. 895, 111 S.Ct. 244, 112 L.Ed.2d 203 (1990).

Fueling these decisions is the recognition that to distinguish between affirmative claims and defenses for purposes of *D'Oench* would reduce the *D'Oench* doctrine's protection to a nullity. *Timberland Design v. First Serv. Bank for Sav.*, 932 F.2d 46, 49 (1st Cir.1991). As articulated by the Sixth Circuit in *Hall v. FDIC*, 920 F.2d 334 (6th Cir.1990) *cert. denied*, 501 U.S. 1231, 111 S.Ct. 2852, 115 L.Ed.2d 1020 (1991):

> "To allow a claim *against* the FDIC asserting the very grounds that could not be used as a

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note or mortgage. However, our subsequent decision in *OPS Shopping Center v. FDIC*, 992 F.2d 306, 310 (11th Cir. 1993), rejects any implication to that effect and holds that the language in *Vernon* was dicta.

> defense to a claim *by* the FDIC is to let technicality stand in the way of principle. Moreover, the effect of such an approach would be to reduce actions Congress has allowed the FDIC to pursue to nullities since defendants could counterclaim and recover what they lost."

Id. at 340 (quoting *Beighley v. FDIC*, 676 F.Supp. 130, 132 (N.D.Tex.1987), *aff'd*, 868 F.2d 776 (1989)).

Recognizing the apparent anomaly in permitting such affirmative claims, a number of decisions have held that the *D'Oench* doctrine bars set-off claims. *See Levy v. FDIC*, 7 F.3d 1054, 1057 (1st Cir.1993) (breach of warranty claims of set-off based upon purchase and sale agreement did not preclude summary judgment on note and guarantee); *FDIC v. Hamilton*, 939 F.2d 1225, 1227, 1229 (5th Cir.) (set-off barred by *D'Oench* where based upon alleged breach of oral agreement to timely advance funds to line of credit); *FSLIC v. Griffin*, 935 F.2d 691, 699 (5th Cir.1991), (*D'Oench* barred set-off claims based upon alleged oral agreements to form a partnership, to fund subsequent loans, and to bid on the property at a specified price) *cert. denied* ___ U.S. ___, 112 S.Ct. 1163, 117 L.Ed.2d 410 (1992); *Resolution Trust Corp. v. Murray*, 935 F.2d 89, 94-95 (5th Cir.1991) (claim that failed institution reneged on pledge to provide further financing barred under *D'Oench*); *FDIC v. State Bank of Virden*, 893 F.2d 139, 143-44 (7th Cir.1990) (misrepresentations concerning solvency and priority of loan in participation agreement in unrelated transaction asserted as set-off barred by *D'Oench*); *FDIC v. Texarkana Nat'l Bank*, 874 F.2d 264, 267 (5th Cir.1989) (fraudulent representations by bank officers barred as oral agreement under *D'Oench*), *as amended on denial of*

reh'g, cert. denied, 493 U.S. 1043, 110 S.Ct. 837, 107 L.Ed.2d 833 (1990); *Mainland Sav. Ass'n v. Riverfront Assocs., Ltd.*, 872 F.2d 955, 956 (10th Cir.) (claims for set-off based upon intentional fraud, gross negligence, reckless conduct, breach of an agreement to fund, and breach of implied covenant of contractual fair dealing arising from alleged oral agreement to fund a second loan barred by *D'Oench*), *cert. denied*, 493 U.S. 890, 110 S.Ct. 235, 107 L.Ed.2d 186 (1989); *Beighley v. FDIC*, 868 F.2d 776, 784 (5th Cir. 1989) (*D'Oench* barred set-off claims based upon breach of alleged agreement to fund additional loans). Underlying each of these decisions is the recognition that the *D'Oench* doctrine bars claims, including claims for set-off, premised upon oral agreements. In each instance, a determination must be made whether the particular set-off claim is based upon an oral "agreement" of the type which would normally be reflected in the records of regular banking transactions. This interpretation of "agreement" was elucidated by the Supreme Court in *Langley v. FDIC*, 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987):

> Certainly, one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in *D'Oench, Duhme*) or of the truthfulness of a warranted fact.

Langley, 484 U.S. at 93, 108 S.Ct. at 402. In the instant case, Jones' claims are premised upon agreements that additional monies could be loaned, that extensions could be granted, and that the bank would permit assumption of the mortgage by a qualified buyer. Such agreements

clearly constitute unwritten and unrecorded conditions upon repayment of the obligations and thus are precluded by the logic of *Langley* and the theoretical underpinnings of *D'Oench* itself. Thus, these claims fall squarely within the *D'Oench* bar, whether asserted as defenses to payment or as claims in the nature of set-off.

C. *Other Arguments Not Fairly Presented to the District Court*

Jones' brief to the en banc court raises for the first time several arguments which were not fairly presented to the district court; e.g., (1) disclosure of confidential information; (2) an argument that a particular oral representation constituted a tortious interference with business relations that was sufficiently independent of the note and mortgage or the restructuring negotiations to escape the *D'Oench* bar; and (3) a breach of fiduciary duty. Well-settled precedent provides that arguments not raised at the district court level will generally not be considered on appeal. *See Baumann v. Savers Fed. Sav. & Loan Assoc.*, 934 F.2d 1506, 1512 (11th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1936, 118 L.Ed.2d 543 (1992); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1557 (11th Cir.1990). " 'Judicial economy is served and prejudice is avoided by binding the parties to the facts presented and the theories argued below.' " *Stewart v. Dep't of Health & Human Servs.*, 26 F.3d 115 (11th Cir.1994) (quoting *Bliss v. Equitable Life Assur. Soc. of U.S.*, 620 F.2d 65, 70 (5th Cir.1980)). Where the record supports a legal argument raised for the first time, an appellate court may exercise its discretion to address the issue where refusal to consider it would

result in a miscarriage of justice. *FDIC v. 232, Inc.*, 920 F.2d 815, 818 (11th Cir.1991). However, it is not at all clear that RTC would not have adduced additional evidence if these theories had been presented by Jones in opposition to summary judgment. In any event, Jones has not demonstrated that refusal to address these issues will result in a miscarriage of justice. Nor does refusal to consider these arguments implicate any of the other exceptional circumstances outlined by this court in *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360-61 (11th Cir.1984).

First, Jones' en banc brief argues that *D'Oench* should not apply because New Freedom disclosed confidential information to Jones' potential buyers, in apparent violation of Fla.Stat. § 655.059. Jones argues that such a claim is not based upon any oral representation or agreement and is completely independent of the note and mortgage. We decline to address this argument, and thus expressly leave open for future resolution the issue of the applicability of the *D'Oench* bar to such a claim. Jones did include in his pleadings a count alleging disclosure of "confidential information" in vague terms. However, this case was not dismissed on the pleadings, but was dismissed upon the district court's grant of RTC's motion for summary judgment. In opposing a motion for summary judgment, "a party may not rely on his pleadings to avoid judgment against him." *Ryan v. Int'l Union of Operating Eng'rs, Local 675*, 794 F.2d 641, 643 (11th Cir.1986). There is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment. *Blue Cross & Blue Shield v. Weitz*, 913 F.2d 1544, 1550 (11th Cir. 1990). Rather,

the onus is upon the parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned. *Road Sprinkler Fitters Local Union No. 669 v. Indep. Sprinkler Corp.*, 10 F.3d 1563, 1568 (11th Cir.1994) (citing *Lazzara v. Howard A. Esser, Inc.*, 802 F.2d 2609, 269 (7th Cir.1986)), *cert. denied*, ___ U.S. ___, 115 S.Ct. 189, 130 L.Ed.2d 122(1994). RTC clearly asserted in its motion for summary judgment that Jones' claims were based upon oral side agreements which were barred by *D'Oench*. In response thereto, Jones filed a Memorandum of Law Opposing Motion for Summary Judgment in which Jones himself referred to his claims as being based upon oral agreements. Nowhere in Jones' brief did Jones suggest that the *D'Oench* bar would not apply because of the peculiar nature of Jones' tort claim. Nowhere in the brief did Jones mention that one aspect of his claim related to the disclosure of confidential information, and thus was not based upon any oral agreement and was not related in any way to the mortgage or note. Indeed, the only indication in the pleadings themselves as to Jones' injury was the injury resulting from the failure of Jones' proposed arrangements with potential buyers, which, of course, in turn depended upon New Freedom's consent to the assumption of Jones' loans. Had Jones fairly presented to the district court an argument that *D'Oench* did not apply to bar this discrete aspect of his amorphous set of claims, then both RTC and the district court could have addressed it.

We decline to exercise our discretion to entertain this argument which was not fairly presented to the district court. Had Jones fairly raised the issue, RTC would have been on notice to make arguments and adduce evidence

in response. For example, RTC could have adduced evidence either that it did not disclose confidential information, or that the buyers whom Jones sent to New Freedom for the purpose of discussing the possible restructuring of the loan were in fact authorized to receive any information relevant thereto. Moreover, even at this late date, it is not clear what damage or injury Jones asserts as a result of the alleged improper disclosure of confidential information. As mentioned above, the only injury suggested in Jones' pleadings does not seem relevant. Under all the circumstances, we do not believe that the interests of justice indicate that Jones should be allowed at this late date to raise such a claim.

The second argument which Jones raises for the first time is one of the several aspects encompassed in Jones' amorphous claim of tortious interference. Jones did include in his statement of the facts relating to the Lake Pickett loan (the smaller of the two loans) that New Freedom officials made a gratuitous offer to Jones' potential buyers to sell the property to them at a discounted price after the bank's foreclosure against Jones. Jones now suggests for the first time that such an oral representation is sufficiently independent of the note and mortgage or the restructuring negotiations to constitute a free-standing tort, and thus escape the *D'Oench* bar. Jones' claim is amorphous and is rather vaguely stated even at this late stage (e.g., Jones does not even indicate whether this particular claim is in the nature of a defamation claim). We decline to entertain the argument because it was not fairly presented to the district court. This argument was not made in Jones' brief to the district court

which purported to present all of Jones' reasons for escaping summary judgment on the *D'Oench* issue.

Finally, Jones asserts on appeal that certain aspects of his breach of fiduciary duty claim should escape the *D'Oench* bar. Again, we decline to entertain an argument which was not fairly presented to the district court. Moreover, even at this late stage, Jones' argument is imprecise. Jones' claim of breach of fiduciary duty seems to be based upon his alleged long-standing relationship with the bank, their financial advice to him related to projects on which the bank extended loans, and the mere fact that Jones reposed confidence in the bank. Such claims appear to be based on the oral representations alleged therein; but the alleged additional duties do not appear in the bank records; and, if successful, Jones' effort would impose upon the bank a duty greater than the duty evidenced by the written documents. It is not readily apparent how such claims could fall outside the *D'Oench* bar. However, we need not decide the issue because the argument was not fairly presented to the district court.

VI. CONCLUSION

Based upon the foregoing reasons, we readily conclude that the district court committed no error in granting summary judgment against Jones based on the *D'Oench* doctrine. Accordingly, the judgment of the district court is

AFFIRMED.

BARKETT, Circuit Judge, concurring in part and dissenting in part:

I dissent to the extent that the majority declines to address Jones' tort claims of intentional interference with an advantageous business relationship and disclosure of confidential information.

In my judgment, Jones sufficiently asserted these claims, which do not challenge the validity of his obligation to the bank, and therefore are not *D'Oench* barred. Jones presented the claims in his pleadings; he argued them in his Memorandum of Law Opposing Motion for Summary Judgment ("Memorandum"), to which he attached depositions providing sufficient evidence to support his claims; and he referred to them again in his briefs before this Court.

In his Memorandum, Jones alleged, among other things, that bank officers approached potential buyers of his Lake Pickett property and offered to discount the note on the property, provided that Jones received nothing from the deal. Jones offered depositions by the potential buyers, Terry Hagen and Steven Chitwood, to support his claim of interference with an advantageous business relationship. He further alleged that the bank officers deliberately disclosed confidential information about his finances to sabotage his deal in order to benefit a rival bank in which the officers had an interest. I do not find this to be a vague or meritless claim.

In my judgment, RTC was on notice and should have made arguments in response. Although Jones could have better articulated and amplified his tort claims, I find that he fairly presented evidence to the district court to support them, and that he provided sufficient notice to RTC such that it should have adduced evidence in response.

Jones did not merely rely on his pleadings, but, in my opinion, offered proof that genuine issues of material fact exist. Accordingly, I believe that the district court should have denied summary judgment on the aforementioned claims.

APPENDIX B – NOVEMBER 23, 1993 OPINION

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-3924

NOVEMBER 23, 1993

MICHAEL D. JONES,
ROBERT S. GUSKIEWICZ,
R. S. FUTCH, JR.,

Plaintiffs-Appellants,

versus

RESOLUTION TRUST CORP.,

Defendant-Third Party
Plaintiff-Appellee,

PHILIP DONLEVY,
WILLIAM CRAWFORD,
ROBERT STONE,

Defendants,

versus

SEMINOLE FLYING AND SOARING,
INC.,
THE FIRST F.A. OF ORLANDO

Third Party Defendants.

RESOLUTION TRUST CORP.,

Plaintiff-Counter-Defendant-
Appellee,

versus

LAKE PICKETT, LTD.,
MICHAEL D. JONES, d/b/a
LAKE PICKETT, LTD.,
MICHAEL D. JONES,

Defendants-Counter-Plaintiffs
Appellants,

THE FIRST F.A. OF ORLANDO,

Defendant.

Appeal from the United States District Court for the Middle District of Florida.

Before FAY and ANDERSON, Circuit Judges, and RONEY, Senior Circuit Judge.

FAY, Circuit Judge:

The appellants, Michael D. Jones, et al appeal summary judgment rendered by the district court in favor of the Resolution Trust Corporation ("RTC") in two cases which were consolidated for appeal. The district court held that all of Jones' claims were precluded by the *D'Oench, Duhme* doctrine and 12 U.S.C. § 1823(e). Because we find the *D'Oench, Duhme* doctrine does not apply to

the majority of Jones' claims[1] against the RTC as Receiver, we REVERSE the district court's grant of summary judgment with respect to those claims. We AFFIRM the district court's order granting summary judgment to the RTC in its corporate capacity, albeit on different grounds.

Standard of Review

Grants of summary judgment are subject to *de novo* review and this Court applies the "same legal standards that control[led] the district court's determination. . . . " *First National Life Ins. Co. v. California Pacific Life Ins. Co.*, 876 F.2d 877, 881 (11th Cir.1989). Although review of a summary judgment usually focuses on whether there are disputed issues of material fact,[2] in this case the district court ruled as a matter of law that Jones' claims were barred. Therefore, our review is more akin to the review of a dismissal for failure to state a cause of action or a judgment on the pleadings,[3] because the dispute is whether there can be any right to assert the claim in the first instance. Given this posture, we must assume that

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[1] We affirm the district court with respect to Count Six of Jones' complaint and counter-claim as we find these counts are barred by *D'Oench*.

[2] Summary judgment is appropriate only if it is clear there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

[3] Our conclusion is reinforced by the wording of the district court's original order of June 8th. R5-83. In that order the court "DISMISSED" for failure to state a claim all of the plaintiffs' claims against the RTC in Case No. 89-207 (suit brought by Jones parties). *Id.* at 10.

the material allegations of the complaint are true and construe all inferences arising therefrom in Jones' favor. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1974). *See also Oladeine v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir.1992) (on motion to dismiss for failure to state a cause of action court must "take as true" "all well pleaded" facts alleged in a complaint).

PART I

The issue in this case is whether a borrower of a failed financial institution may ever have a valid claim, which involves his loans, against the institution once it is in the hands of the federal regulators. Jones claims he was injured by the tortious conduct of the now defunct bank's employees with regard to two proposals to purchase properties the bank held as security for two of his loans – conduct he claims caused the proposals to fall through and led to his losses. Moreover, he attempts to hold the RTC responsible for this allegedly tortious conduct on the part of the bank's employees because he asserts that the regulators were, in effect, controlling the institution during the relevant period. Stated another way, he attempts to apply principles of agency law to hold the federal regulators vicariously liable for the allegedly tortious conduct of the bank's employees. These claims are asserted against the RTC in both of its capacities.

In response, the RTC in its corporate capacity, as holder of Jones' notes, seeks to foreclose on the subject properties and asserts that Jones' claims are barred by the *D'Oench, Duhme* doctrine and 12 U.S.C. § 1823(e). Both

the doctrine and the statute prohibit a party from bringing claims, or raising defenses, which arise out of secret, unrecorded or oral agreements. The RTC argues that, not only do these laws bar Jones' claims as defenses to its foreclosure action, it also argues that *D'Oench* and § 1823(e) prevent Jones from bringing these claims against the RTC as receiver for New Freedom. The question is whether tort claims, which do not challenge the validity of an obligation, are barred by either the doctrine or the statute which address "agreements."

FACTS

Background

Michael Jones was a borrower of the twice defunct Freedom Savings & Loan Association. His relationship with the bank began in 1978 with the institution then known as ComBank, which was later acquired by, or merged with, Freedom. Exhibit Vol. R1-51-18-19. (Deposition of Michael D. Jones). Over the years Jones obtained several personal and business loans from Freedom, two of which are involved in the instant case.[4] The first loan was secured by a mortgage on a residential real estate development known as Pickett Downs ("Lake Pickett"). *Id.* at 31-33. The collateral for the second loan consisted of property which Jones and his partners apparently

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[4] Although Jones suggests in his Notice of Appeal that he is also appealing the district court's ruling as to Case No. 89-205-CIV-ORL-19, that case is not properly before us because there was no final order entered. *See* R3-151-2 (Order of August 13, 1991 – Entry of final judgment in favor of RTC in Case Nos. 89-207 and 89-208).

intended to develop as a "fly-in" residential community with an air-strip ("Airport Property"). *Id.* at 85-88.

On July 23, 1987, over a year after the last of these loans was made, the Federal Home Loan Bank Board ("FHLBB") declared Freedom insolvent and appointed the Federal Savings & Loan Insurance Corporation ("FSLIC") as receiver for what will henceforth be referred to as "Old Freedom."[5] The FHLBB simultaneously chartered a new federal savings and loan institution with the same name as the old one, which, for purposes of distinguishing the two, shall be referred to as "New Freedom." The FSLIC then transferred some of the assets of Old Freedom, including the loans at issue, to New Freedom under an acquisition agreement. At the same time, FSLIC, through New Freedom, contracted with The First, F.A. of Orlando ("The First"), another financial institution in the area,[6] to provide management services to New Freedom. Pursuant to this management agreement, Jack Shirek, Executive Vice President and Chief Operating Officer of

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[5] The FHLBB and FSLIC were abolished by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub.L. No. 101-73. § 401 et seq., 103 Stat. 183, 354 (1989) (codified in scattered sections of 12 U.S.C.). The RTC has been substituted for these entities.

[6] In its brief the RTC refers to The First as "an experienced management team from private industry." Appellee's Brief at 3. This characterization fails to clarify that the "team" in question was drawn from a single competitor bank. One of Jones' principal complaints is that FSLIC brought in a competitor, and a potential purchaser of the assets of New Freedom, to manage the bank. In light of Jones' charge, the RTC's characterization appears evasive and tends to lend credence to Jones' complaint, rather than the opposite.

The First, was made President of New Freedom. The FSLIC also agreed to indemnify The First against various potential liabilities that might arise in discharging the contract. In addition, FSLIC removed the board of directors of New Freedom and replaced them with its own candidates. From this point forward New Freedom was ostensibly a new, independent institution. However, it continued to operate under extremely close supervisory control from FSLIC and the FHLBB. In particular, New Freedom could not extend or renew loans in excess of two million dollars without the approval of the regulatory authorities in Atlanta. Moreover, a representative of the regulators attended the board meetings, to observe, if not to advise, the board on its decisions.[7]

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[7] None of these facts are in dispute. It is merely the legal significance of these facts which the parties dispute. In its brief the RTC acknowledges that a FSLIC representative attended board meetings. Appellee's Brief at 9. The RTC chided Jones, however, for "misstat[ing]" the testimony of Jack Shirek as to the level of FSLIC's involvement in New Freedom, *Id.* at 8, and offers instances where Shirek denied that FSLIC's representative got involved in decision-making. The RTC *fails* to note that some of Mr. Shirek's statements it does *not* cite tend to support a greater level of involvement by FSLIC than the RTC appears willing to admit. For example, Shirek testified that some of the "forebearances that were asked of Freedom," by Jones and the prospective purchasers of the Airport Property needed "both board and FSLIC approval." R3-122-24, lines 22-23 (Deposition of Jack Shirek). In describing the approval process for a loan request, Shirek testified that, Freedom's "board would make a decision as to whether it would approve it and recommend it to FSLIC, and *usually FSLIC could give some indication at that time* because a representative also always attended every Freedom board meeting." *Id.* at 25, lines 20-24 (emphasis added). When asked whether the Freedom board of directors would submit

The Deals

Some time after the creation of New Freedom, between February and May of 1988, Jones and his partners were approached with offers to purchase the Lake Pickett and Airport properties. It is the bank's alleged mishandling and malfeasance with respect to the subsequent negotiations regarding these offers to purchase that form the basis of Jones' claims.

The Lake Pickett Property

In February of 1988, Jones says he was approached by a group of builders interested in buying the Lake Pickett property. According to Jones, he discussed the purchase with Steve Chitwood, a broker representing some of the other builders of the Pickett Downs project, and Terry Hagen, a builder who owned several lots in Phase IV of the development. Jones alleges he reached a tentative agreement with Hagen and Chitwood that the buyers could have the property for $150,000 plus assumption of the mortgage held by New Freedom. The mortgage balance at that time was approximately $850,000. After this agreement was reached, Hagen and Chitwood went to New Freedom to verify the bank would permit an assumption. They met with Robert Stone, one of the defendants in this suit, who was then an officer of New Freedom.

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even loan proposals which it had *declined* to FSLIC, Shirek responded, "[i]t would depend on whether or not the FSLIC representative wanted that." *Id.* at 26, lines 5-6.

Jones claims that at this meeting Stone told the prospective purchasers that Jones was about to go into default on some other loans, in which case *all* of Jones' loans would be declared in default because they were cross-collateralized. He further claims that Stone told Hagen and Chitwood that the bank would be willing to sell the property for a discounted price of $640,000.[8] Jones asserts that New Freedom's offer to sell the property at a discount, along with the information concerning the status of his other loans (which he says was erroneous) caused the proposed sale to fall through. He claims the buyers backed out because they now believed they could save approximately two hundred thousand dollars by simply waiting until New Freedom foreclosed and then purchasing the property at a lower price.

The Airport Property

In April of 1988 the Euro-American Investor Group ("Investor Group") expressed an interest to Jones and his partners in purchasing the Airport Property. The investor Group, however, wanted some zoning changes approved before they would be willing to buy. Jones claims he had

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[8] Hagen testifies in his deposition that, prior to the meeting with Stone, he had the impression that Freedom had problems with Jones personally. In fact, his impression that there were problems was a source of concern to him because, as a participant in the development project, his investment could be negatively affected by any failure of Jones' portion. He claims this was his motive in seeking to purchase an interest in Jones' portion. Exhibit Vol. R1- 14-8 & 24. Hagen testifies that it was his impression that the disclosures and the discount were offered because the bank was out to get Jones. *Id.* at 9, 11-12, & 25.

previously contacted New Freedom, concerning a different proposed sale which included the same zoning changes, and was assured by Fred Lazard,[9] formerly a senior vice president of the bank, that the bank would be cooperative and flexible regarding the maturity of the loan because the proposed zoning changes would enhance the property's value, benefitting all concerned. Thus, Jones says he believed the Investor Group's condition was not a problem. Nevertheless, he contacted New Freedom to confirm his previous understanding with Lazard and discovered Lazard was no longer employed by New Freedom.

Instead, he met with defendant Philip Donlevy, a senior vice president at New Freedom. Donlevy told Jones that he did not have the authority to make any decisions on extensions of this size. He indicated Jones should speak to William Crawford, Donlevy's superior and another defendant in this case. Crawford told Jones that he would need Jones' proposal in writing before he could take any action on it, but that Lazard's representations would be honored as long as Jones and the other borrowers honored their part of the deal. Jones claims that he left this meeting with the impression that New Freedom would not stand in the way of any sale or assumption by the Investor Group by immediately calling his note at maturity.

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[9] Mr. Lazard's name appears variously in the record as "Lazar" and "Lazard." We use the spelling that appears most often.

On approximately May 20, 1988, Donlevy, representing New Freedom, met with Jones and two of the principals in the Investor Group, Allan Keen and A.C. Leerdam. At this meeting, Keen and Leerdam expressed to Donlevy a need to have their proposal approved no later than June 15, 1988, because Leerdam was leaving the country and needed a commitment from New Freedom to allow the assumption in order to obtain the commitment to the project from Leerdam's investors in Europe. Once again, Donlevy claimed the bank would need a written proposal of the deal. The Investor Group submitted their written proposal to New Freedom on approximately the 23rd of May.

At some point during, or shortly after, these meetings, Jones claims Jack Shirek became aware of the proposed sale of the Airport Property to the Investor Group and conceived a plan to frustrate and delay approval of the proposal. The principals of the Investor Group were well known to, and good customers of, The First. According to Jones, were it not that assumption of the existing mortgage would be cheaper than seeking alternate financing, the Investor Group would have approached The First for the new loan. Jones claims, Shirek and The Fist conceived a plan to frustrate the proposed assumption, to delay the sale and force Jones into foreclosure with the intent to gain a benefit for The First. After foreclosure The First could step in, either to offer the financing itself, or to acquire the property at a discount and then resell it to the Investor Group at a profit.[10]

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[10] Quite apart from whether Jones' allegations that Shirek took affirmative steps to injure him are true, according to

Whatever Jack Shirek's plans may have been, on May 27, 1988, the board of directors of New Freedom met and considered the proposal submitted by the Investor Group. That proposal was rejected. Jones claims that it was rejected at Shirek's suggestion. He also claims that the board further decided that day not to permit an assumption under any circumstances – again at Shirek's direction. In spite of the fact that this second alleged decision by the board foreclosed the possibility of an assumption, Jones claims that Crawford and Donlevy continued to act as if an assumption would be permitted by continuing to ask for revised proposals and additional documents from the Investor Group and Jones. He claims that these misrepresentations were made knowingly, at the direction of Shirek, and with the intent to delay any sale long enough to call Jones' loans and put him into foreclosure.

As of early June, the Investor Group and Jones were continuing to attempt to get an approval of the assumption, unaware that no such assumption would be approved. On June 3rd a tentative oral agreement was

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Shirek's deposition testimony, it *is* true that The First was interested in some of New Freedom's assets.

> When we were asked by the, basically the Federal Savings and Loan Insurance Corporation to take a management position with Freedom, we were interested in expanding by assuming some of Freedom's offices. We informed both the Atlanta office of the [FHLBB] and the Washington Office of [FSLIC] of our interest, and that one of the reasons we would be going into Freedom was particularly for that.

Later on we submitted a bind for Freedom. R3-122-11, lines 15-24 (Deposition of Jack Shirek.)

reached between Crawford and Leerdam regarding the Investor Group's assumption of the existing mortgage. Crawford allegedly told Leerdam the agreement was subject to the final approval of the board of directors. He represented that the board could be polled by telephone and could give Crawford an answer by that afternoon which he would relay to Leerdam. Apparently though, no one heard further from Crawford that day although Jones and Leerdam say they made numerous attempts to reach him. On June 6th, Jones finally reached Crawford and was told the Board had rejected the second proposal for an assumption, but that he was still waiting to hear from the Investor Group concerning any revised proposals.

In fact, Jones asserts, Crawford never presented the deal he discussed with Leerdam to the board, or informed any other senior officers at New Freedom of its existence. Nor, claims Jones, had Crawford ever contacted Leerdam or the Investor Group concerning the proposal as he had indicated to Leerdam he would. Moreover, when on June 7th Leerdam finally spoke to Crawford, after five attempts to reach him, Crawford allegedly told Leerdam there were "problems with the sellers" and he needed forty-eight hours before he could give Leerdam an answer. At this, Leerdam testifies he knew the deal was "impossible." Jones asserts Crawford's representations were false. The only "problem" Freedom had with Jones was it needed time to complete the steps necessary to call his loans and put him into foreclosure to "kill the deal." Jones asserts that all of the misrepresentations and delays were made at Shirek's direction.

On June 3rd, while Leerdam and Jones were attempting to ascertain the status of the proposed assumption,

New Freedom, through Shirek, was taking steps to call Jones' loans. On or about that day Jones' loans were packed up and transferred to the Special Assets Division, the loan workout group. He also claims that about this time Shirek directed the letters of credit securing the interest on the Airport Property be drawn upon. On June 6, 1988, New Freedom drew drafts on the letters of credit and caused them to be presented and paid. Later that month Jones and the Investor Group met with New Freedom representatives, at which time Jones claims he and the buyers first learned of the board's May 27th decision not to permit an assumption under any circumstances. New Freedom called Jones' loan and he filed suit against the bank.[11]

THE PROCEDURAL HISTORY

Jones sued New Freedom and various of its officers in state court on a number of tort theories. New Freedom responded by instituting foreclosure proceedings on the subject properties. Before the cases were resolved, on February 7, 1989, the FHLBB declared New Freedom insolvent and appointed FSLIC as Conservator.[12] On

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[11] Jones sued New Freedom in state court for wrongfully drawing on the letters of credit before they were due. According to his Third Amended Complaint, he received a judgment in his favor against New Freedom, *see* Third Amended Complaint at 35, ¶ 62, although we have not been able to find a copy of it in the record.

[12] The terms "conservator" and "receiver" seem to be used interchangeably with respect to the functions performed by both the FSLIC and RTC. For example, as to the first failure of *Old* Freedom, the RTC refers to FSLIC as being appointed

March, 8, 1989, FSLIC, as Conservator for New Freedom, removed all of these cases to federal court. To further complicate matters, in 1989 the Congress passed FIRREA, one of the elements of which was to dissolve FSLIC and the FHLBB and create the RTC. *See supra* footnote 6. Thus, the RTC as Receiver for New Freedom Savings and Loan, now stands in the shoes of New Freedom with respect to Jones' claims against the bank. The RTC in its corporate capacity, as the purchaser of the assets of New Freedom, takes over the claims against Jones on the notes.[13]

"Receiver for Old Freedom." Appellee's Brief at 2. With respect to the failure of *New* Freedom, the RTC notes that FSLIC was appointed "Conservator for New Freedom." *Id.* at 3. Whatever may be the differences in the two functions, the parties have neither brought them to our attention, nor argued that they make a difference to the outcome. Moreover, pursuant to an order dated October 12, 1989, the Office of Thrift Supervision ("OTS") the post-FIRREA entity which supplanted the FHLBB in some of its functions, replaced FSLIC as *Conservator* with the RTC as *Receiver* shortly after the enactment of FIRREA. R2-41-5 ("Exhibit A"). Thus, we will disregard any significance which might otherwise attach to the difference.

[13] Jones does not distinguish between the RTC as Receiver and the RTC in its corporate capacity. Indeed, he often does not distinguish between New Freedom and the RTC. *See* Third Amended Complaint at 2, ¶ 4 ("For purposes of this Complaint, FREEDOM and the RTC shall be deemed synonymous."). For the reasons we discuss below this attempt to blur the distinction between the two is unavailing and his claims against the RTC in its corporate capacity fail.

Case Number 89-207-CIV-ORL-19

In the first lawsuit Michael D. Jones, and his partners in the Airport Property, Robert S. Guskiewicz and R.S. Futch, Jr., sued Freedom Savings and Loan Association, various officers of Freedom, The First, and Jack Shirek. The complaint contains seven counts.[14]

(1) Breach of Fiduciary Duty

(2) Intentional and Unjustified Interference with Contractual or Business Relationships

(3) Breach of Duty Not to Disclose Information Concerning Depositor's Accounts

(4) Negligent Misrepresentation/Fraud

(5) Intentional Interference with an Advantageous Business Relationship

(6) Declaratory Judgment that the notes the RTC seeks to collect are unenforceable or void

(7) Negligent Supervision

The RTC counterclaimed seeking foreclosure on the Airport Property based on failure to pay the promissory note when due.

Case Number 89-208-CIV-ORL-18

In the second case, the RTC sued Lake Pickett, Ltd., and Jones, in his capacity as General Partner of Lake Pickett, Ltd., to foreclose on the Lake Pickett property

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[14] Not every count includes all of the defendants. Count Six is against the RTC only, and Count Seven is against only The First and Jack Shirek.

due to non-payment. In response, Jones filed a third party complaint which mirrors the above complaint.

PART II

Duhme and Gloom: RTC as Receiver

For decades the *D'Oench, Duhme* doctrine has proved the nemesis of borrowers seeking to escape repayment of their loans from failed institutions. And in the wake of the crisis of bank failures in the last decade, a crisis which continues into the present, the shadow it casts on their claims has grown ever longer. The doctrine prevents borrowers from raising oral, secret or otherwise undocumented agreements as a defense to actions by the RTC to collect on promissory notes of failed institutions, or to assert such agreements as the basis of a claim against the RTC. *Baumann v. Savers Fed. Sav. & Loan Ass'n*, 934 F.2d 1506, 1515 (11th Cir.1991) *cert. denied* ___ U.S. ___, 112 S.Ct. 1936, 118 L.Ed.2d 543 (1992). *D'Oench* involved a secret agreement not to collect on a promissory note which was given solely to prevent the bank's books from reflecting a loss which it otherwise would have shown. *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 454, 62 S.Ct. 676, 678, 86 L.Ed. 956 (1942). This ruling was predicated on the policy that the bank examiners, who seek to insure the integrity of our banking system, ought to be able to rely on a bank's records. *D'Oench* at 460, 62 S.Ct. at 680-81. The federal authorities also need reliable information with which to decide how to handle the remaining assets of an insolvent institution,

secure in the knowledge that these assets will not disappear in a flurry of alleged secret agreements not to collect.

Congress codified the *D'Oench* doctrine in 12 U.S.C. § 1823(e) which reads:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section . . . , either as security for a loan or by purchase *or as receiver of any insured depository institution,*[15] shall be valid against the Corporation unless such agreement –
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

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[15] The italicized language was added as a FIRREA amendment to the existing section. *See* Pub.L. 101-73, § 217(4), 103 Stat. at 256. By its terms this language makes 1823(e) applicable to the FDIC in both of its capacities, and therefore, to the RTC as well, by virtue of § 501 of FIRREA. Nevertheless, § 1823(e) still refers to "agreements," and subsections (1) through (4) make clear that this word refers to contracts.

12 U.S.C. § 1823(e) (emphasis added). Undoubtedly, *D'Oench* and § 1823(e), taken together, cut off a number of the claims or defenses which could have otherwise been asserted against the institution prior to insolvency. The question is whether the statute and the doctrine together cut off *all* claims. We think, by virtue of the plain meaning of the language, they do not.

In order to determine if the district court correctly analyzed whether *D'Oench* applies to this case we must first clarify what Jones is *not* claiming. In the original order granting partial summary judgment the district court noted: "The Jones parties have not raised any issue of fact *as to the authenticity* of the notes, mortgages, and credit card accounts involved in any of these actions, or *as to the amount due* upon the face of these instruments. . . . " R5-83-8 (Order of June 8, 1990) (emphasis added). Thus, Jones does not claim the loans are invalid because they were fraudulently induced. He does not disclaim executing the notes.[16] He does not dispute the amount due.

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[16] The sole claim that Jones makes which goes to the note themselves is Count Six, the request for a declaratory judgment that the notes are unenforceable. Count Six is covered by *D'Oench* because it represents an attempt to tie Jones' claims against New Freedom to his liability on the notes. Whatever liability the RTC assumes in its capacity as receiver is independent from the RTC's claims on the notes, notwithstanding that the claims may be ultimately adjudged the same amount. This is because a successful claimant may only collect his pro rata share of the assets of the failed institution which the RTC as receiver calculates its asset recovery will permit. *See* 12 U.S.C. § 1441a(b)(4)(A) (providing that RTC has "all the powers provided to the FDIC in sections 11, 12 and 13 of the Federal Deposit Insurance Act") *and* 12 U.S.C. § 1821(d)(4)(B)(ii)-(iii)

Furthermore, none of his claims sounds in contract. He does not seek to prove the existence of an "agreement." He does not claim that New Freedom breached an enforceable oral contract to extend or otherwise modify his loans. He does not claim that New Freedom breached a contract, to which he was a known third party beneficiary, with his potential buyers to allow assumption of the loans. Instead, Jones claims that the bank officers breached their fiduciary duty of non-disclosure, and that

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(describing methodology of calculation of percentage paid out on claims).

In contrast, the RTC in its corporate capacity, has a right to anything it can prove is owing on the obligations, unencumbered by any other claims relating to the defunct institution, as long as the claims are covered by § 1823(e), or if they are not, the RTC qualifies as a holder in due course. *See Federal Deposit Ins. Corp. v. McCullough*, 911 F.2d 593, 603 (11th Cir.1990), *cert. denied* ___ U.S. ___, 111 St.Ct. 2235, 114 L.Ed.2d 477 (1991). There are at least two exceptions to this rule. The first is to challenge the RTC's holder in due course status and claim that the regulators were aware of the actions on which claimant's defense or claim rest. (This is what Jones seeks to do with his agency argument.) But this exception requires that the claimant show the regulators had *actual* knowledge of the acts alleged. *See Federal Deposit Ins. Corp. v. The Cremona Co.*, 832 F.2d 959, 964 (6th Cir.1987), *cert. dismissed sub nom. Gonda v. Federal Deposit Ins. Corp.*, 485 U.S. 1017, 108 S.Ct. 1494, 99 L.Ed.2d 883 (1988). *But see Langley v. Federal Deposit Insurance Corp.*, 484 U.S. 86, 95, 108 S.Ct. 396, 403, 98 L.Ed.2d 340 (1987) (actual knowledge is irrelevant with respect to "agreements" falling into 1823(e)). Jones submits no evidence the regulators had actual knowledge of any of the wrongful acts alleged. The second exception is estoppel. *See Federal Deposit Ins. Co. v. Harrison*, 735 F.2d 408, 412 (11th Cir. 1984). Jones submits no evidence that he relied on, or was harmed by, any representations of FSLIC employees themselves. Therefore we affirm the district court's ruling as to Count Six.

the unauthorized disclosures, negligence, and misrepresentation caused him injury by frustrating the sale of the property which secured the promissory notes on which the RTC seeks to collect. The specific acts alleged are a mixed bag of non-feasance, misfeasance and malfeasance. In short, his claims sound in tort.

We have already held, in contrast to some circuits, *see, e.g., Timberland Design v. First Service Bank for Savings*, 932 F.2d 46, 50 & n. 4 (1st Cir.1991), that *D'Oench* does not operate "to bar free standing tort claims . . . not related to a specific asset acquired by the FDIC." *Vernon v. Federal Deposit Ins. Corp.*, 981 F.2d 1230, 1233-34 (11th Cir.1993). *Accord Astrup v. Midwest Federal Savings Bank*, 886 F.2d 1057, 1059 (8th Cir.1989); *Commerce Federal Sav. Bank v. Federal Deposit Ins. Corp.*, 872 F.2d 1240, 1244 (6th Cir.1989). "Related to" in this statement means a cause of action *against* or challenging the obligation. The thrust of both *D'Oench* and 12 U.S.C. § 1823(e) is to negate claims or defenses attacking *the validity of an obligation* by virtue of some "agreement."[17]

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[17] We reject the notion that a tort claim is indistinguishable from a contract claim just because a loan is somehow involved. Banks are in the business of lending money and taking deposits. Therefore, it is likely that the sorts of torts that will be asserted against them will arise out of the *handling* of such loans and deposits. Nevertheless, we acknowledge sometimes a borrower may have claims and defenses arising in both tort and contract and that, sometimes, the distinction is a fine one. That is not the case here. Since we decline to read "agreement," or the rest of the language of 1823(e), so broadly as to include tortious conduct, we simply hold that in such cases only the contract claims would be barred if they do not comport with the requirements of § 1823(e).

Jones is not seeking to enforce any secret or unwritten "agreement" so it is difficult to see how *D'Oench* or § 1823(e) could apply to his claims. No one is likely to memorialize an agreement or intention to commit a tort. Nor does the commission of a tort have any bearing on the validity of an institution's assets as recorded such that the bank examiners are likely to be misled, the issue that concerned the Supreme Court in *D'Oench*. Although this may seem to be an artificial distinction, it is one that appears to be compelled by the language of the statute. Moreover, as we discuss below, while it would certainly be consistent with the rest of congressional policy as expressed through the FIRREA if we were to decide that the RTC as receiver for a defunct institution is simply not subject to the tort claims of those who deal with it, that is not what § 1823(e) says, and we think it an unwarranted extension of the language to engraft that reading upon either *D'Oench* or § 1823(e). Jones' claims with respect to the RTC in its corporate capacity are a different matter.

PART III

Liability of RTC in its Corporate Capacity

Jones' attempts to argue that, because the federal regulatory authorities exerted so much control over the institution, its employees, and its agents, The First and Jack Shirek, were all merely agents of the federal regulators. On that question there was a great deal of debate in oral argument as to whether the evidence in the record established that FHLBB or FSLIC had dominion and control over New Freedom such as to establish an agency

relationship. From a factual standpoint the regulators certainly exerted such control over New Freedom that, outside of the regulatory environment, New Freedom might have been deemed its agent. *See Colon v. Operation South, Inc.*, 597 So.2d 364, 365 (Fla.Dist.Ct.App.1922) (agent's "authority may be conferred in writing, orally, or it may be inferred from a given set of facts.").[18] This is because New Freedom was, in essence if not technically, a bridge bank. *See* 12 U.S.C. § 1821(n).[19]

Section 1821(n) authorizes the Federal Deposit Insurance Corporation (FDIC) to create "bridge banks" out of institutions which it deems to be in default or that it anticipates will be in default.[20] 12 U.S.C.

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[18] Florida law would probably be the relevant source of the elements necessary to establish an agency relationship in Florida were it not for the fact that, as we will show, federal law precludes finding the bridge bank is an agent of the federal agency.

[19] Although the authority for the actions taken here by the FHLBB and FSLIC derived from 12 U.S.C. § 1729 "Liquidation of insured institutions," a section which does not specifically authorize the establishment of bridge banks, in every material respect those actions mirrored those under permitted under § 1821(e).

When asked at oral argument whether New Freedom was a "bridge bank," counsel for the RTC responded that "technically" it was not a bridge bank, but "conceptually" it was the same thing. While this answer was precisely correct it fell lamentably short of clarifying the issue for the court.

[20] Although prior to the enactment of FIRREA, the insolvency of commercial banks and savings and loan institutions was handled by separate regulatory entities and governed by separate statutes, in practice the actions of FSLIC paralleled those of the FDIC. *See, e.g., North Mississippi Savings and Loan*

§ 1821(n)(1)(A).[21] Bridge banks are creatures of statute. A bridge bank serves as a vehicle to smooth the transition of a failed institution so that the FDIC need not immediately put an institution into receivership and pay out on insured deposits if there is a possibility that a buyer for the assets may emerge.[22] It is a temporary institution.[23]

Assn v. Hudspeth, 756 F.2d 1096 (5th Cir.1985), *disapproved on other grounds, Coit Independent Joint Venture v. Federal Sav. & Loan Ins. Corp., as Receiver for FirstSouth*, 489 U.S. 561, 574-77, 109 S.Ct. 1361, 1368-71, 103 L.Ed.2d 602 (1989) (FHLBB took actions similar to those in this case; chartering new institution, removing president); *First Fed. S & L Assn v. First Fed. S & L Assn*, 531 F.Supp. 251, 256 (D.Hawaii 1981) (Regulations promulgated under section 1729(d) give the receiver power to exercise all "rights and powers of such institution"). *Accord United States v. Gaubert*, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). Of course, after FIRREA, § 1821(n) applies to both commercial banks and savings institutions.

[21] The RTC has the same powers pursuant to 12 U.S.C. § 1441a(b)(4)(A) which, among other things, gives the RTC all the powers the FDIC enjoys under § 1821.

[22] One of the statements made at oral argument by the RTC's counsel was that there was "no buyer in sight" for the assets of Old Freedom. This is relevant because it explains why FSLIC took the actions it did with respect to creating and chartering New Freedom. If FSLIC could have found a buyer for the assets of Old Freedom, the ultimate losses, sustained once New Freedom was closed, might have been minimized. As it turned out, it appears that, at best, the FSLIC only postponed the inevitable, and at worst, gave the institution time to incur further losses.

[23] Pursuant to 12 U.S.C. § 1821(n)(9) a bridge bank's status terminates after 2 years, although that may be subject to a limit of three, one year extensions.

In taking control of a failed bank and creating a bridge bank, the FDIC is empowered to: (!) "assume such deposits of such insured bank or banks . . . as the Corporation may, in its discretion determine to be appropriate . . . ,"; (2) "assume such other liabilities . . . as the Corporation may, in its discretion, determine to be appropriate . . . "; (3) "purchase assets"; and (4) "perform any other temporary function[24] which the Corporation may, in its discretion, prescribe in accordance with this chapter." 12 U.S.C. § 1821(n)(1)(B)(i)-(iv).

The powers of the FDIC and the RTC are extensive with respect to bridge banks. They have virtual control of the institution, and complete control and approval powers over all major decisions.[25] In spite of this control,

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[24] Some of the functions which the statute permits the FDIC to perform are to: approve the articles of association, 12 U.S.C. § 1821(n)(2)(C); appoint an interim board of directors, 12 U.S.C. § 1821(n)(2)(D); approve the bylaws, 12 U.S.C. § 1821(n)(2)(E); selectively transfer assets and liabilities from the old institution to the new institution, 12 U.S.C. § 1821(n)(3); remove any member of the board of directors, 12 U.S.C. § 1821(n)(4)(A)(i); set compensation for the board and senior management, 12 U.S.C. § 1821(n)(4)(A)(ii); indemnify interim directors, officers, employees and agents of bridge banks, 12 U.S.C. § 1821(n)(4)(B); waive capital requirements which would otherwise apply, 12 U.S.C. § 1821(n)(4)(C); approve the election of a chairperson for the board, as well as the designation of chief executive officer, 12 U.S.C. § 1821(n)(4)(E)(i) & (ii); require approval of Corporation prior to any sale of assets, merger or consolidation, sale of stock or securities, etc., 12 U.S.C. § 1821(n)(4)(K); advance the bridge bank operating funds, 12 U.S.C. § 1821(n)(5)(B); issue stock for the bridge bank, 12 U.S.C. § 1821(n)(5)(C).

[25] *See* 12 U.S.C. § 1441a(e)(1) (describing the powers of the RTC over institutions "organized by" and "within the control of

12 U.S.C. § 1821(n)(6)(A) states unequivocally: "A bridge bank is *not* an agency, establishment, or instrumentality of the United States." *Id.* (emphasis added). In other words, the bridge bank is not an extension of the FDIC or RTC and the regulators cannot be held vicariously liable for any negligence in the administration or operation of a bridge bank. Holders of claims are limited to the assets of the bridge bank.

There is no question that the regulators exerted a similarly high degree of control over New Freedom in this case. Nevertheless, consistent with the statutory exclusion of liability in § 1821(n)(6)(A), the Supreme Court has held the regulatory agency cannot be held liable for any negligence in the performance of its regulatory duties to the extent those duties are exercises of its discretionary functions.[26] *United States v. Gaubert*, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). Furthermore, in *Gaubert* the Court held that the type of functions performed by FSLIC in this case were discretionary.

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the Corporation.") Pursuant to this section, the RTC may control "growth of assets," "lending and borrowing activities," "asset acquisitions," "use of brokered deposits," "payment of deposit rates," "policy or credit standards," and "capital standards." This is a higher degree of control than normally associated with truly independent organizations.

[26] One allegation does allege negligence directly, on the part of FSLIC, insofar as it entered into the agreement with The First to run New Freedom. Jones claims this agreement put the "fox in the henhouse," Appellant's Reply Brief at 4, because The First was a competitor or potential purchaser of New Freedom's assets should it fail.

Gaubert was the former chairman of a defunct savings and loan sued the United States under the Federal Torts Claim Act (FTCA) for injuries he said he suffered in connection with the allegedly negligent supervisory actions of the FHLBB. The FHLBB had asked, (without even having declared the institution insolvent) for Gaubert to remove himself from the board of directors, and to post a $25 million interest in real property as security for his personal guaranty that the bank's assets would exceed regulatory minimums. Thereafter, the FHLBB required the members of the board of directors to resign and replaced them with its own candidates. *Id.* at ___, 111 S.Ct. at 1272. It recommended the hiring of "a certain consultant to advise [the bank] on operational and financial matters," "mediated salary and disputes," and generally "became more involved in [the bank's] day-to-day business." *Id.*

In spite of this high degree of involvement in the bank's management, a degree arguably as high or higher than in this case, the Supreme Court held the FHLBB was not liable in tort for any negligence in the operation of the bank because its actions fell into the "discretionary functions" exception to the FTCA. *Gaubert* at ___, 111 S.Ct. at 1275-80. The Court found that the FHLBB's involvement in the day-to-day operation of the bank did not mean that its actions were "operational" and not the product of discretion exercised in accordance with some policy objective. *Id.* at ___, 111 S.Ct. at 1278-79.

[9] What Jones is attempting to do, by arguing that an agency relationship existed between FSLIC and the employees of New Freedom and The First, is to arrive indirectly at what Gaubert attempted to do directly – that

is hold the United States liable in tort for the alleged negligence of New Freedom's employees. The Supreme Court's decision in *Gaubert* makes clear that no such liability will be imposed on the federal banking regulatory agencies in the conduct of their responsibilities. We sympathize with Jones' plea that the regulators be held to some standard of accountability for the actions they take in such circumstances. Certainly, this case illustrates the difficulties posed for borrowers when their banks fail. It also calls into question the efficacy of some of the regulators' practices. Nevertheless, Congress and the Supreme Court have stated unequivocally that no such accountability will be imposed on the United States as a result of its regulatory activities in this area. It is not difficult to understand why given the magnitude of the banking crisis. Thus, Jones' claim against the RTC in its corporate capacity fails and it is entitled to summary judgment on the notes. Jones is limited to asserting his claim against the RTC ad Receiver, because it stands in the shoes of New Freedom. If he succeeds, Jones will not be able to collect any more than the amount to be determined by the RTC pursuant to the statute.

CONCLUSION

For the foregoing reasons, we REVERSE the summary judgment in favor of the RTC in its capacity as Receiver for New Freedom, except with regard to Count Six. The judgment as to Count Six in both cases is AFFIRMED. The district court's order with respect to the RTC is its corporate capacity, and in every other respect, is AFFIRMED.

ANDERSON, Circuit Judge, concurring in part and dissenting in part:

To the extent that the court affirms the judgment of the district court, I concur; however, I respectfully dissent from that portion of the majority opinion which reverses the judgment of the district court. There are at least two aspects of the majority opinion with which I disagree.

First, so far as I understand the facts of this case, and also the language of the majority opinion, I can discern no difference – i.e, a difference which has legal significance in the application of the *D'Oench*[1] bar – between the claims which the majority opinion permits to proceed and the claims which the majority opinion holds are *D'Oench*-barred. To the best of my understanding, the claims are identical. The claims differ only in two respects, neither of which has legal significance with respect to the application of the *D'Oench* doctrine. The permitted claims are asserted against RTC in its capacity as receiver, while the barred claims are asserted against RTC in its corporate capacity. The law is well established, and the majority opinion does not suggest otherwise, that the *D'Oench* bar applies in both capacities,[2] and thus this is not the

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[1] *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942).

[2] In *Federal Savings and Loan Insurance Corp. v. Two Rivers Associates, Inc.*, 880 F.2d 1267 (11th Cir.1989), this circuit held: [T]he reasoning behind *D'Oench, Duhme* requires that it be applied to protect the FDIC and the FSLIC regardless whether the regulatory body is acting in its capacity as a receiver or as a corporate insurer.

Id. at 1277. Other cases in this circuit are in accord. *FDIC v. McCullough*, 911 F.2d 593 (11th Cir.1990), *cert denied*, ___ U.S. ___,

distinctions which the majority is drawing. The only other difference I can discern is that the barred claims were asserted in the context of defenses to the effort of RTC to collect on a note, while the permitted claims were

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111 St. Ct 2235, 114 L.Ed.2d 477 (1991); *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101 (11th Cir.1990). In addition, several other circuits have squarely held that the *D'Oench* doctrine applies to the F.D.I.C. in its receiver capacity. *Oklahoma Radio Associates v. FDIC*, 987 F.2d 685 (10th Cir.1993); *Timberland Design, Inc. v. First Serv. Bank for Savings*, 932 F.2d 46 (1st Cir.1991); *FDIC v. McClanahan*, 795 F.2d 512 (5th Cir. 1986); *FDIC v. First National Finance Co.*, 587 F.2d 1009 (9th Cir.1978). Other circuits, without expressly addressing the issue, have applied the *D'Oench* rule in cases where the F.D.I.C. was acting in the capacity of a receiver. *FDIC v. Hadid*, 947 F.2d 1153 (4th Cir.1991); *FDIC v. Bernstein*, 944 F.2d 101 (2nd Cir. 1991); *FDIC v. Wright*, 942 F.2d 1089 (7th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1937, 118 L.Ed.2d 544 (1992); *Adams v. Madison Realty & Development, Inc.*, 937 F.2d 845 (3rd Cir.1991); *First State Bank v. City and County Bank*, 872 F.2d 707 (6th Cir.1989); *Firstsouth, F.A. v. Aqua Constr., Inc.*, 858 F.2d 441 (8th Cir.1988).

In 1989, 18 U.S.C. § 1823(e) was amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) to explicitly cover situations in which the FDIC acts in its receiver as well as its corporate capacity. FIRREA was enacted on August 9, 1989; several circuits have held this provision to apply retroactively. *See FDIC v. Longley I Realty Trust*, 988 F.2d 270 (1st Cir.1993); *Wright*, 942 F.2d at 1097 (7th Cir.1991); *FDIC v. Kasal*, 913 F.2d 487 (8th Cir.1990), *cert. denied*, 498 U.S. 1119, 111 S.Ct. 1072, 112 L.Ed.2d 1178 (1991); *Triland Holdings & Co. v. Sunbelt Serv. Corp.*, 884 F.2d 205 (5th Cir.1989) (applying FIRREA amendments to cases pending at the time FIRREA amendments to cases pending at the time FIRREA was enacted). See also *Twin Constr., Inc. v. Boca Raton, Inc.*, 925 F.2d 378, 381-82 (11th Cir.1991) (quoting amended statute, but noting that result the same whether statute or common law *D'Oench* doctrine applied).

asserted as claims in the nature of a setoff. However, the majority opinion does not suggest that this fact carries legal significance, and I am aware of no case law suggesting that the *D'Oench* bar applies only to bar defenses to a note.[3] Therefore, this cannot be the distinction that the majority is drawing. Thus, the only differences which I can discern between the claims that the majority permits to proceed and the claims that the majority holds are *D'Oench*-barred are differences which have no legal significance. The majority opinion does not suggest that these two differences have any legal significance; rather, the majority opinion indicates that the reason for its refusal to apply the *D'Oench* bar is that the claims at issue are tort claims. However, if it is true that the tort claims at

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[3] If *D'Oench* applied only to bar defenses to a suit on a note, the legal effect would be that RTC could collect on the note, but the obligor on the note could claim in a separate count that the RTC, as successor to the predecessor bank, was liable based on the same facts which were asserted as a defense to the note, which liability could then be set off against the RTC's recovery on the note. There would be the practical difference that the amount of the setoff would probably be less than the full amount of the note (the pro rata share of the assets of the failed institution likely being less than 100%).

However, the case law does not impose this narrow limitation on the application of the *D'Oench* doctrine, and I do not understand the majority opinion to be suggesting this. Indeed, this court very recently squarely rejected the contention that *D'Oench* applies only to bar claims which are related to specific assets, like a note. *OPS Shopping Center, Inc. v. FDIC*, 992 F.2d 306 (11th Cir.1993) ("every circuit court of appeals which has expressly addressed this argument has rejected it" *id.* at 309; "we reject appellant's argument that the *D'Oench* doctrine does not apply merely because the claim at issue relates to a liability of the bank rather than to a specific asset," *id.* at 311).

issue here are not *D'Oench*-barred, as the majority holds in one part of its opinion, then I cannot understand why the majority holds in another part of its opinion that those same claims are *D'Oench*-barred when asserted as a defense to the effort to collect on the note.

Second, and wholly apart from the apparent logical inconsistency, above discussed, I respectfully disagree with the rationale of the majority opinion that the *D'Oench* doctrine does not bar tort claims.[4] In my judgment, the Supreme Court has held that the *D'Oench* doctrine does bar tort claims. In *Langley v. FDIC*, 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987), the Supreme Court applied 12 U.S.C. § 1823(e) (codifying the *D'Oench* doctrine) to bar a claim based upon an oral misrepresentation by a banking official, notwithstanding the fact that the claims sounded in tort. The claim was for fraud; that is, that the misrepresentation was fraudulently made. In *Langley*, the alleged fraudulent misrepresentations were made during discussions which were part of ordinary banking transactions and which culminated in a land purchase, a note and a mortgage.

Similarly, in this case, the misconduct of which Jones complains involves negotiations and discussions concerning the bank's approval of persons or entities to assume part of Jones' mortgage indebtedness. It is apparent from the statement of facts in the majority opinion that Jones' claims are based upon negotiations between the bank and officials, on the one hand, and, on the other hand, Jones

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[4] Appellants did not argue on appeal that *D'Oench* should not apply *because* the claims are tort claims. In my judgment, this court should not raise the issue *sua sponte*. See note 7, *infra*.

and the persons proposing to purchase Jones' property and assume Jones' indebtedness with the bank. The background of Jones' claim is that Jones wanted to sell the property and needed to do so to escape the burden of the debt, that Jones had potential purchasers who were willing to assume Jones' indebtedness, and that certain concessions by the bank were needed including in particular the bank's approval of the assumption by the potential purchasers. It is clear to me, from the facts recited by the majority, and from the briefs and the complaints, that the gist of Jones' claim is that the bank officials strung him along, leading him to believe that the bank's approval would be forthcoming, and then pulled the rug out from under Jones' feet by refusing at the last minute to approve assumption of the loans. This case is analogous to *Langley* in that the instant tort claims are intertwined with oral representations which Jones asserts led him to believe New Freedom would permit assumption of his mortgage indebtedness.

The First Circuit has also squarely rejected the position adopted today by the majority:

> This conclusion is not altered by the fact that some of the claims asserted by Timberland sound in tort. The district court correctly held that *D'Oench* bars defenses and affirmative claims whether cloaked in terms of contract or tort, as long as those claims arise out of an alleged secret agreement. . . . To allow the plaintiff to assert tort claims based on the oral agreement would circumvent the very policy behind *D'Oench*, and therefore, *D'Oench* is generally said to apply to tort claims. *See Beighley [v. Federal Deposit Insurance Corporation]*, 868 F.2d [776]

> at 784. Although not decided under *D'Oench*, the Supreme Court's decision in *Langley v. FDIC* supports this conclusion by holding that § 1823(e) bars fraud claims that are premised upon an oral agreement. 484 U.S. 86, 93, 108 S.Ct. 396, 402, 98 L.Ed.2d 340 (1987). We therefore conclude that *D'Oench* applies with equal force to tort claim arising out of secret agreements.

Timberland Design, Inc. v. First Serv. Bank for Sav., 932 F.2d 46, 50 (1st Cir.1991) (footnotes omitted). The tort claims asserted in *Timberland* (negligent misrepresentation, deceit, and breach of fiduciary duty), arose out of negotiations concerning additional loans, a context analogous to the claims in this case.

A number of other courts have held that *D'Oench* bars tort claims in similar situations. *See McCullough v. FDIC*, 987 F.2d 870 (1st Cir.1993) (*D'Oench* barred claim that bank liable for failing to disclose order requiring removal of hazardous waste from property); *Castleglen, Inc. v. Resolution Trust Corp.*, 984 F.2d 1571 (10th Cir.1993) (*D'Oench* barred tort claim arising out of misrepresentations made during contract negotiations); *In re 604 Columbus Ave. Realty Trust*, 968 F.2d 1332 (1st Cir.1992) (tort claims based on illegal kickback scheme barred by *D'Oench*); *Oliver v. Resolution Trust Corp.*, 955 F.2d 583 (8th Cir.1992) (*D'Oench* barred tort claim for breach of fiduciary duty based on violation of oral side agreements regarding loan).[5]

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[5] In *Texas Refrigeration Supply, Inc. v. FDIC*, 953 F.2d 975 (5th Cir.1992), the Fifth Circuit held that *D'Oench* did not preclude a borrower from asserting claims for wrongful

It might be argued that *Astrup v. Midwest Federal Sav. Bank*, 886 F.2d 1057 (8th Cir.1989), supports the majority's position in this case. In that case, Golden Pine was a subsidiary of First Federal Savings & Loan Association. First Federal (the bank) was prohibited by relevant regulations from engaging in real estate development; therefore the real estate project at issue was undertaken by its subsidiary, Golden Pine. Golden Pine and Astrup entered into a joint venture involving development of a 36-unit condominium project. The bank held the mortgage on the property. The notes and mortgage held by the bank called for interest at the market rate, but Astrup apparently claimed that Golden Pine, acting as the bank's alter ego, was to provide financing at rates below the market. *Id.* at 1058 n. 2. Apparently, Astrup also asserted that Golden Pine agreed to assume Astrup's portion of the mortgage, and that Golden Pine breached its fiduciary duty to Astrup, as a joint venturer, by fraudulently entering into a transaction involving discriminatory interest rates. *Id.* at 1059-60. There was a jury verdict against Golden Pine. The district court granted a judgment notwithstanding the verdict with respect to the contract claims; the Eighth Circuit, relying upon the *D'Oench* doctrine, affirmed.

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acceleration and unreasonable disposal of collateral at foreclosure. The court reasoned that those claims were not barred because they did not arise from a secret or unrecorded agreement, but from the implied good faith obligation made part of every contract under state law. Jones has not argued that the bank had an obligation with respect to the assumption of his mortgage indebtedness which arose by operation of law, and thus would be apparent to the bank examiners when the available documents were considered in light of the relevant law.

However, the district court denied judgment notwithstanding the verdict with respect to the tort claims. The Eighth Circuit also affirmed this ruling, stating that the *D'Oench* doctrine affords no protection against tort claims, whether for personal injuries in an automobile collision, or for securities violations, "or for fraudulently entering into transactions involving discriminatory interest rates, such as the agreements alleged by plaintiff in the case at bar." *Id.* at 1060. I note that the Eighth Circuit cited no precedent for its holding.

It would also appear that *Astrup* is distinguishable from the instant case; unlike this case, *Astrup* did not involve a tort arising out of ordinary banking transactions. Rather, in *Astrup*, the tort arose out of the nonbanking business operation conducted by Golden Pine. The business transaction was apparently structured in this matter precisely because the bank could not under the relevant regulations engage in the real estate development business. Indeed, the *D'Oench* policy itself derived from the "federal policy to protect . . . the public funds which it [the federal banking authority] administers against misrepresentations as to the securities or other assets in the portfolios of the banks which respondent insures." *D'Oench*, 315 U.S. at 457, 62 S.Ct. at 679. That policy would not seem to be implicated at all in *Astrup*, because it seems clear that Golden Pine would have no depositors insured by the federal banking authority. By contrast, the tort claims in this case arise out of the discussions and representations allegedly made to Jones during negotiations concerning the assumption of Jones' indebtedness by potential purchasers of the collateral. Thus, I submit that *Astrup* provides no support for the

majority's holding that the instant tort claims (which I submit are intertwined with oral discussions conducted during ordinary banking transactions) escape the *D'Oench* bar.

I also submit that it would undermine the purposes behind the *D'Oench* doctrine to fail to apply the doctrine here. First, it would undermine the purpose designed to permit bank examiners to rely on a bank's records in evaluating the fiscal soundness of the bank and in deciding how best to deal with a bank in trouble. It is clear to me that any obligation of New Freedom to permit assumption of the Jones mortgage is precisely the kind of banking obligation that one would reasonably expect to be reflected in the bank records. If appellants prevailed in the instant suit, the effect would be very similar to enforcing the alleged oral promise by New Freedom to permit assumption of Jones' mortgage indebtedness; the effect would be to impose liability notwithstanding the fact that no document in the bank's records evidenced a commitment concerning assumption of the mortgage. Second, failure to apply the *D'Oench* doctrine in this case would undermine the purpose designed to insure mature consideration of banking transactions by appropriate banking officials. Here, it is clear that the appropriate bank officials did not authorize assumption of Jones' mortgage indebtedness. Finally, it is also clear that Jones lent himself to an arrangement calculated to mislead bank examiners. Jones failed to obtain an official document, or any writing at all, evidencing a commitment to permit the mortgage assumptions which Jones sought.

The majority relies upon *Vernon v. FDIC*, 981 F.2d 1230 (11th Cir.1993). In that case, this court did hold that

the *D'Oench* doctrine does not apply to "free standing tort claims." That case, however, involved a tort claim arising out of the sale of the bank's own stock; unlike the instant case, it did not involve a tort claim arising out of oral discussions and representations during ordinary banking transactions and with respect to which it would be expected that any obligation on the bank would appear in the bank records. See *OPS Shopping Center, Inc. v. FDIC*, 992 F.2d 306 (11th Cir.1993). By contrast, Jones' tort claims arise out of oral representations and discussions concerning assumption of loans and New Freedom's ultimate refusal to approve the assumption of Jones' indebtedness by persons whom Jones proffered as potential purchasers of property which comprised the collateral for Jones' mortgage. Any obligation on the part of the bank relating to assumption of mortgages would ordinarily be expected to be reflected in the records of the bank.

I respectfully submit that the majority's holding constitutes an unwarranted extension of *Vernon*. In my judgment, the majority has extended *Vernon*'s "free standing" tort theory to a claim which I submit is not "free standing." The *Vernon* rule makes good sense. For example, when bank examiners conduct their periodic inspection of a bank's records concerning ordinary banking transactions, they would not expect to find a record describing and quantifying the bank's potential liability with respect to vehicular accidents, especially those not yet reported or subject to claim. Potential claimants know that they have the usual statute of limitations period to make such claims; the failure to do so immediately could not be said

to facilitate any misleading of bank examiners. By contrast, to extend the *Vernon* rationale to this case would undermine the purposes underlying *D'Oench*.

It is not necessary in this case for me to define the precise line between a "free standing" tort which escapes the *D'Oench* bar under *Vernon*, and a tort which is sufficiently intertwined with oral representations made during ordinary banking transactions to be barred by *D'Oench*. It is clear from the Supreme Court's holding in *Langley* that a claim arising from a fraudulently made oral misrepresentation is barred. The only cases to date which have held a tort claim to be immune from *D'Oench* have involved claims which did not arise out of ordinary banking transactions.[6] Such claims are readily classified as "free standing" torts. Because the instant tort claims not only arise out of ordinary banking transactions but are also intertwined with and inseparable from alleged oral misrepresentations, they fall easily within the holding of *Langley*. Thus, I need not address or decide whether some tort claims might be sufficiently separable from any oral misrepresentations so that the *D'Oench* bar is escaped notwithstanding the fact that the tort arose out of ordinary banking transactions.[7]

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[6] See above discussion of *Vernon* and *Astrup*.

[7] Although the language of the majority opinion seems to make no distinction amongst the acts and possible torts committed by the bank officials, an argument could be made that one aspect of the bank officials' actions is sufficiently separable from any oral misrepresentations – i.e., the apparent allegation that the officials were motivated by their own self-interest (a conflict of interest) to "kill the deal" which Jones was proposing. I doubt that even a claim limited solely to this activity could escape the

I conclude that both the case law and the purposes of the *D'Oench* doctrine point forcefully to the application of the doctrine in this case. I respectfully dissent from the failure of the court to do so.

D'Oench bar in this case. It is clear that any such scheme to "kill the deal" was intertwined with oral representations or misrepresentations. In other words, the means employed to "kill the deal" was to string Jones along with oral misrepresentations and then refuse to approve the assumption. The motivations of the bank officials may have been separable, but the implementation was intertwined. The Supreme Court decision in *Langley* stands for the proposition that *D'Oench* bars a claim based upon oral representation, even though the misrepresentation is motivated by fraud.

However, I need not decide in this case whether there may have been some discrete acts of the bank officials which are sufficiently separable from any oral representations to escape the *D'Oench* bar. As noted earlier, appellants have not even argued in this case that *D'Oench* is inapplicable because the claims are tort claims, much less that the claims fall into a certain category of tort claims that escape the *D'Oench* bar. I respectfully submit that it would be unfair to appellee in this case for the court either to try to draw the uncharted line defining the outer limits of the *D'Oench* bar or try to recast and stretch Jones' claims to fit them within any such new definition. Appellants have not asserted this theory or anything remotely resembling it. Appellee thus has had no opportunity to assist the court in defining the appropriate line, and has had no opportunity to proffer evidence to indicate that the instant claims fall on the side of the *D'Oench* bar. At this stage of the proceedings, appellate review of the grant of summary judgment, I respectfully submit that this court should not raise the issue *sua sponte* in order to reverse the judgment of the district court.

APPENDIX C – JUNE 8, 1990 ORDER

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FREEDOM SAVINGS AND
LOAN ASSOCIATION,

Plaintiff,

v. CASE NO. 89-204-CIV-ORL-19

MICHAEL D. JONES, and
MICHAEL D. JONES, P.A.,

Defendants.

FREEDOM SAVINGS AND
LOAN ASSOCIATION,

Plaintiff,

v. CASE NO. 89-205-CIV-ORL-19

DUNMAR CORPORATION and
MICHAEL D. JONES,

Defendant.

FREEDOM SAVINGS AND
LOAN ASSOCIATION,

Plaintiff,

v. CASE NO. 89-206-CIV-ORL-19

MICHAEL D. JONES, and
MICHAEL D. JONES, P.A.,

Defendant.

MICHAEL D. JONES, ROBERT S. GUSKIEWICZ and R.S. FUTCH, JR.,

Plaintiff,

v. CASE NO. 89-207-CIV-ORL-19

FREEDOM SAVINGS AND LOAN ASSOCIATION, PHILLIP DONLEVY, WILLIAM CRAWFORD, ROBERT STONE,

Defendants.

FREEDOM SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

v. CASE NO. 89-208-CIV-ORL-19

LAKE PICKETT, LTD., MICHAEL D. JONES, as General Partner d/b/a LAKE PICKETT, LTD.,

Defendants.

ORDER

This cause was considered by the Court upon the Motion for Summary Judgment, or Alternatively Motion for Partial Summary Judgment, and Request for Oral Argument (Doc. No. 50 in 89-204, Doc. No. 45 in 89-205, Doc. No. 60 in 89-206, Doc. No. 45 in 89-207, and Doc. No. 30 in 89-208, filed February 23, 1990); Memorandum of Law in support thereof (Doc. No. 70 in 89-204, filed April 25, 1990); Memorandum of Law in opposition thereto (Doc. No. 76 in 89-204, filed May 23, 1990); Affidavits

and Depositions submitted in support of the Motion for Summary Judgment (Doc. Nos. 52, 53, 55, 56, 58, and 60 in 89-204, filed February 23, 1990); and Affidavit of Michael D. Jones in opposition to the Motion for Summary Judgment (Doc. No. 77 in 89-204, filed May 23, 1990)[1].

Each of these five consolidated cases began in state court. The first (Case No. 89-207) was initiated by Michael D. Jones, Robert S. Guskiewicz, and R.S. Futch, Jr. against Freedom Savings and Loan Association ("Freedom") and three of its former officers. In addition to asserting affirmative defenses, Freedom filed a Counterclaim in that action to foreclose a mortgage on what has been termed by the parties as the "airport property." Freedom then filed four separate lawsuits against Michael D. Jones and entities with which he is associated. Case No. 89-204 is an action to collect on two promissory notes executed by Michael D. Jones and one promissory note executed by Michael D. Jones, P.A. Case No. 89-205 is an action to collect on a promissory note executed by Dunmar Corporation. Case No. 89-206 is an action to collect on delinquent credit card accounts of Michael D. Jones and Michael D. Jones, P.A. Case No. 89-208 is an action to foreclose a mortgage on what the parties have called the "Pickett Downs" or "Lake Pickett" property.

In their Amended Complaint in 89-207 (Doc. No. 26 in 89-207, filed October 24, 1989), Jones, Guskiewicz and

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[1] The transcripts of the deposition of Robert T. Wilhite (Doc. No. 80, filed May 25, 1990), and the Renewal of Request for Oral Argument and Citation of Additional Authority (Doc. No. 81, filed May 30, 1990) were not considered because they were filed after the deadline announced by the Court for filing of matters pertaining to the summary judgment motion.

Futch sue Freedom, and three of its former officers, Phillip Donlevy, William Crawford, and Robert Stone on six Counts: Count I alleges breach of fiduciary duty; Count II is entitled as "an action for intentional and unjustified interference with contractual or business relationships"; Count III alleges breach of duty not to disclose information concerning depositor's accounts; Count IV claims fraud and misrepresentation; Count V is for tortious interference resulting in the disruption of a business and/or contractual relationship; and Count VI is a request for a declaratory judgment that the notes and mortgages which are the subject of these actions are unenforceable. The Counterclaims filed by the Jones parties[2] in 89-204, 89-205, 89-206, and 89-208 mirror these six Counts. With leave of Court, Jones, Guskiewicz and Futch filed a Second Amended Complaint in Case No. 89-207 (Doc. No. 63), adding a Count VII which names The First, F.A. as an additional Defendant.

On July 23, 1987, the Federal Home Loan Bank Board (FHLBB) appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as Receiver for Freedom and the FSLIC conveyed the assets of the old Freedom to a newly created Freedom. On October 13, 1989, the Director of the Office of Thrift Supervision appointed the Resolution Trust Corporation (RTC) as Receiver of Freedom. On

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[2] The following will be referred to collectively as "the Jones parties: Michael D. Jones and Michael D. Jones, P.A. in Case Nos. 89-204 and 89-206; Dunmar Corporation and Michael D. Jones in 89-205; Michael D. Jones, Robert S. Guskiewicz and R.S. Futch, Jr. in 89-207; and Lake Pickett, Ltd. and Michael D. Jones as general partner thereof in 89-208.

that same date, RTC, as Receiver, sold certain of Freedom's assets to another bank and sold the remainder of the assets, including all of the notes, mortgages, and credit card accounts at issue in the instant cases, to RTC in its corporate capacity. RTC, as Receiver, retains the liabilities of Freedom. RTC, in its corporate capacity, has been substituted for Freedom as Counterclaimant in 89-207 and as Plaintiff in 89-204, 89-205, 89-206, and 89-208. RTC, in its capacity as Receiver, has been substituted for Freedom as Defendant in 89-207 and as Counterdefendant in 89-204, 89-205, 89-206, and 89-208.

RTC seeks summary judgment in these consolidated actions on the theory that the claims and defenses of the Jones parties are based solely on oral agreements and representations and, therefore, that the *D'Oench* doctrine[3] and 12 U.S.C. § 1823(e) make these claims and defenses unenforceable against the RTC.

When a federal banking authority seeks to collect on a note acquired by it in the course of a regulatory takeover or a purchase and assumption transaction, the *D'Oench* doctrine insulates the banking authority from defenses and claims which are based on agreements or representations not evident on the face of the note because such "secret" agreements or representations could mislead the banking authority as to the true value of assets of the failed bank. This is true no matter how strong a debtor's claims or defenses might have been vis-a-vis the failed bank. The *D'Oench* doctrine was codified

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[3] The doctrine derives from *D'Oench, Duhme & Co. V. Federal Deposit Insurance Corporation*, 315 U.S. 447 (1942), and its progeny.

with respect to the Federal Deposit Insurance Corporation (FDIC) in 12 U.S.C. § 1823(e), which provides:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement –
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

As successor to the FSLIC, RTC is entitled to invoke the protections of the *D'Oench* doctrine. *See Castleglen, Inc. v. Commonwealth Savings Association*, 728 F.Supp. 656, 662 (D. Utah 1989) . Moreover, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIREA") explicitly made § 1823(e) applicable to the RTC. Pub. L. No. 101-73 § 501, 103 Stat. 363, 370 (1989). This provision applies to the RTC in both its corporate and receivership capacities. *Castleglen, supra*, at 674.

The bar established by § 1823(e) and the *D'Oench* doctrine is far-reaching. It applies to affirmative claims as well as defenses. *See*, e.g., *Chatham Ventures, Inc. v. Federal Deposit Insurance Corporation*, 651 F.2d 355 (5th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982). *See also Castleglen, supra*, at 664 n. 7. Allegations regarding an agreement or arrangement which has not been properly recorded are barred even if the agreement or arrangement was made between the bank and a party other than the maker of the note. *Federal Savings and Loan Insurance Corporation v. Homes International Development Corporation*, 721 F.Supp. 290, 293 (S.D. Fla. 1989). Furthermore, § 1823(e) and the *D'Oench* doctrine go so far as to bar a claim or defense based on misrepresentations by a bank or a savings and loan institution even if the misrepresentations amounted to fraud in the inducement and even if the federal banking authority had knowledge of the asserted defense when it acquired the note. *Langley v. Federal Deposit Insurance Corporation*, 484 U.S. 86 (1987)

The protections of § 1823(e) and the *D'Oench* doctrine might not apply to bar allegations that the conduct of the banking authority *itself* after it had acquired the asset in question is grounds for estoppel. *Federal Deposit Insurance Corporation v. Harrison*, 735 F.2d 408, 412-13 n. 6 (11th Cir. 1984). *But see Castleglen, supra* at 676 (indicating that § 1823(e) and the *D'Oench* doctrine bar claims of post-acquisition conduct by the FSLIC and RTC amounting to fraud, negligent misrepresentation, breach of fiduciary duty, breach of covenant of good faith and fair dealing, and negligence). In this case, however, the wrongs of which the Jones parties complain were not alleged to

have been committed by the FSLIC itself or by the RTC itself but, rather, by bank employees who were subject to the oversight and control of the federal regulatory authority. The Jones parties have not alleged that the FSLIC or, subsequently, the RTC has done anything other than exercise the authority vested in it by Congress. Thus, there is no avenue for avoiding *D'Oench* and § 1823(e). See *Federal Savings and Loan Insurance Corporation v. Locke*, 718 F.Supp. 573, 583 (W.D. Tex. 1989); *Metcalf, Ltd. v. Federal Savings and Loan Insurance Corporation*, 719 F.Supp. 953, 957-58 (D. Colo. 1988).

Because the *D'Oench* doctrine and § 1823(e) bar all of the Jones parties' claims and defenses against RTC, there is no genuine issue of material fact remaining in these consolidated actions regarding liability as between the Jones parties and RTC, and RTC is entitled to judgment as a matter of law on this issue in each case.

As to the amount of liability, the affidavit of Lou Farless, Asset Specialist for RTC, (dated February 21, 1990 and attached to Doc. No. 53 in 89-204, filed February 23, 1990) sets forth the amounts owed to RTC by the Jones parties as of February 8, 1990. The Jones parties have not raised any issue of fact as to the authenticity of the notes, mortgages, and credit card accounts involved in any of these actions, or as to the amount due upon the face of these instruments in 89-204, 89-206, 89-207, and 89-208. In Case No. 89-205, however, in opposition to a previous Motion for Summary Judgment, an Affidavit of Michael D. Jones was filed in which he states that the calculation of interest due on the Dunmar Corporation note is incorrect, apparently because Mr. Jones claims that more interest was paid on this note than is credited to the Dunmar

Corporation in the calculations of the adverse party. (Doc. No. 19 in 89-205, filed July 14, 1989, ¶3). The Court finds this sufficient to raise an issue of fact as to the amount owed under the note in 89-205. As to the amounts owed by the Jones parties to RTC in 89-204, 89-206, 89-207, and 89-208, however, the Court finds that there is no issue of fact and that RTC is entitled to judgment in those cases as a matter of law.

For the foregoing reasons, pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Court GRANTS the Motion for Partial Summary Judgment with regard to the issues of liability as between RTC and the Jones parties in all of these consolidated cases, 89-204, 89-205, 89-206, 89-207, and 89-208. The Court also grants the Motion for Partial Summary Judgment as to the amount owed by the Jones parties in 89-204, 89-206, 89-207, and 89-208.

The Clerk is directed to enter Judgment in Case No. 89-204 in favor of Plaintiff RTC and against Defendants as follows. RTC shall recover from Michael D. Jones the amount of $28,771.80[4] on the note dated October 30, 1986. RTC shall also recover from Michael D. Jones the amount of $23,745.33[5] on the note dated November 3, 1986.

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[4] This figure is based on the principal amount of $23,000.00 plus interest through February 8, 1990 of $4,864.60 (as calculated by Lou Farless) plus interest from February 9, 1990 through the date of this Order at the rate of $7.56 per diem.

[5] This figure is based on the principal amount of $19,000.00 plus interest through February 8, 1990 of $3,995.33 (as calculated by Lou Farless) plus interest from February 9, 1990 through the date of this Order at the rate of $6.25 per diem.

Further, RTC shall recover from Michael D. Jones, P.A, the amount of $25,019.74[6] on the note dated October 30, 1986.

The Clerk is also directed to enter Judgment in Case No.89-206 in favor of Plaintiff RTC and against Defendants as follows. RTC shall recover from Michael D. Jones the amount of $12,565.02 on account number 5314-8001-0000-2149 and the amount of $14,448.93 on accounts numbered 4305-0101-0500-5386 and 5314-8001-0500-5386. RTC shall also recover from Michael D. Jones, P.A. the amount of $6,924.60 on account number 5314-8001-0004-4992.

Judgment cannot be entered in 89-205 until the resolution at trial of the issue as to the amount of interest still owing under the note. Furthermore, in accordance with Rule 54(b) of the Federal Rules of Civil Procedure, the Court withholds entry of judgment in favor of RTC in Case Nos. 89-207 and 89-208 until all claims are resolved in those cases. In Case No. 89-207, by reason of the *D'Oench* doctrine and § 1823(e), the Plaintiffs' claims against RTC are DISMISSED for failure to state a claim; however, Plaintiffs still retain claims in that case against the individual Defendants, Phillip Donlevy, William Crawford, and Robert Stone, and against The First, F.A. As to Case No. 89-208, the Court by its Order of May 18, 1990 (Doc. No. 60 in Case No. 89-208) has allowed Lake Pickett, Ltd. and Michael D. Jones to file a Cross-claim

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[6] This figure is based on the principal amount of $20,000.00 plus interest through February 8, 1990 of $4,230.14 (as calculated by Lou Farless) plus interest from February 9, 1990 through the date of this Order at the rate of $6.58 per diem.

against The First, F.A., and that claim also remains for resolution at trial.

In addition to the Motion for Summary Judgment, the Court has considered the following matters:

1. Motion for Leave to File Additional Counts to Defendants/Counter-Plaintiffs' Counterclaim and Memorandum of Law in Support Thereof (Doc. No. 73 in Case No. 89-204, Doc. No. 65 in 89-205, Doc. No. 80 in 89-206, filed May 7, 1990).

The additional counts sought to be added to the Jones parties' Counterclaim were previously added, with leave of Court, to the Complaint of the Jones parties in Case No. 89-207. The Court having determined above that these claims cannot be asserted against the RTC, the Motion to File Additional Counts is MOOT and is DENIED.

2. RTC's Motion to Sever (Doc. No. 75 in 89-207 and Doc. No. 63 in 89-208, filed May 24, 1990); and Memorandum of Law in Opposition thereto (Doc. No. 81 in 89-207 and Doc. No. 71 in 89-208, filed May 31, 1990).

RTC seeks to sever the equitable matters relating to foreclosure from the legal issues involved in these cases. The Court having determined that RTC is entitled to foreclosure as a matter of law, this Motion is rendered MOOT and is, therefore, DENIED.

3. The First, F.A.'s Motion to Dismiss, Motion to Strike and Memorandum of Law in Support Thereof (Doc. No. 71 in Case No. 89-207, filed May 23, 1990); and Memorandum of Law in opposition thereto (Doc. No. 74

in 89-207, filed May 24, 1990). The Motion to Dismiss and the Motion to Strike are DENIED.

4. The First, F.A.'s Motion for Extension of Time for Discovery, Filing of a Motion of Summary Judgment, and Filing of a Pre-Trial Stipulation and Memorandum of Law in Support Thereof (Doc. No. 76 in 89-207 and Doc. No. 64 in 89-208, filed May 24, 1990); and the Jones parties' Motion for Continuance of Trial and Memorandum of Law in Support thereof (Doc. No. 80 in 89-207 and Doc. No. 72 in 89-208, filed May 31, 1990) and Memorandum of Law in Response thereto filed by RTC and The First, F.A. (Doc. No. 82 in 89-207 and Doc. No. 73 in 89-207, filed June 6, 1990)

The Jones parties request a continuance of trial based solely on the fact that The First, F.A.'s Motion to Dismiss had not yet been ruled on at the time of filing the Motion for Continuance. The Motion to Dismiss has now been denied. The First, F.A. was added as a party Defendant after the discovery cut-off in this case and now requests time in which to conduct discovery. However, The First, F.A. is represented by the same law firm that has represented RTC in this action. The claims made against The First, F.A. are the same claims previously made against Freedom/RTC. Furthermore, The First, F.A. has not identified any particular areas in which it desires to conduct discovery. For these reasons, the Motion for Extension and the Motion for Continuance are DENIED.

DONE AND ORDERED at Orlando, Florida, this 8th day of June, 1990.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES
DISTRICT JUDGE

Copies to:
All Counsel of Record

APPENDIX D – MARCH 13, 1995 ORDER DENYING PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3924

RESOLUTION TRUST CORP,

Plaintiff

versus

DUNMAR CORP. and MICHAEL D. JONES,

Defendants-Counterclaim
Plaintiffs,

THE FIRST F.A.,

Defendant-Counterclaim
Defendant,

SHERMAN DANTZLER
and JACK SHIREK,

Defendants,

and

THE FIRST F.A. OF ORLANDO and
RESOLUTION TRUST CORP.,

Counter-Defendants.

MICHAEL D. JONES,
ROBERT S. GUSKIEWICZ,
R.S. FUTCH, JR.,

Plaintaiffs [sic]-Appellants,

versus

RESOLUTION TRUST CORP.,

Defendant-Third Party
Plaintiff-Appellee,

PHILIP DONLEVY, WILLIAM CRAWFORD, ROBERT STONE,

Defendants,

versus

SEMINOLE FLYING AND SOARING, INC., and THE FIRST F.A. OF ORLANDO,

Third Party Defendants.

RESOLUTION TRUST CORP.,

Plaintiff-Counter
Defendant-Appellee,

versus

LAKE PICKETT, LTD., a Florida Limited Partnership; MICHAEL D. JONES, as general partner, d/b/a LAKE PICKETT, LTD., a Florida limited partnership; MICHAEL D. JONES, individually and as Trustee,

Defendants-Counter-
Plaintiffs-Appellants,

THE FIRST F.A. OF ORLANDO,

Defendant.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING

BEFORE: TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARCKETT, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by appellants', is Denied.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

APPENDIX E – APRIL 12, 1994 ORDER

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3924

MICHAEL D. JONES;
ROBERT S. GUSKIEWICZ;
R.S. FUTCH, JR.,

Plaintiffs-Appellants,

versus

RESOLUTION TRUST CORP.,

Defendant-Third Party
Plaintiff-Appellee

versus

PHILIP DONLEVY;
WILLIAM CRAWFORD;
ROBERT STONE,

Defendants,

versus

SEMINOLE FLYING AND
SOARING, INC.,
and The First F.A.
of Orlando,

Third Party Defendants.

RESOLUTION TRUST CORP.,

Plaintiff-Counter
Defendant-Appellee,

versus

LAKE PICKETT, a Florida
Limted [sic] Partnership;
MICHAEL D. JONES,
as general partner, d/b/a
Lake Pickett LTD.,
a Florida Limited
Partnership; MICHAEL
D. JONES, Individually
and as Trustee,

Defendants-Counter-
Plaintiffs-Appellants,

The First F.A. of Orlando,

Defendants.

On Appeal from the United States District
Court for the Middle District of Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion November 23, 1993, 11th Cir.,
1993, ___ F.2d ___)

(April 12, 1994)

Before TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, EDMUNDSON, COX, BERCH, DUBINA, BLACK and CARNES, Circuit Judges.

BY THE COURT:

A member of this court in active service having requested a poll on the suggestion for rehearing en banc and a majoriy [sic] of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

APPENDIX F – JUNE 29, 1989 ORDER

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FREEDOM SAVINGS
AND LOAN ASSOCIATION,

Plaintiff,

v. CASE NO. 89-204-CIV-ORL-19

MICHAEL D. JONES
and MICHAEL D.
JONES, P.A.,

Defendants.

FREEDOM SAVINGS
AND LOAN ASSOCIATION,

Plaintiff,

v. CASE NO. 89-205-CIV-ORL-19

DUNMAR CORPORATION and
MICHAEL D. JONES,

Defendants.

FREEDOM SAVINGS
AND LOAN ASSOCIATION,

Plaintiff,

v. CASE NO. 89-206-CIV-ORL-19

MICHAEL D. JONES
and MICHAEL D.
JONES, P.A.,

Defendants.

MICHAEL D. JONES,
ROBERT S. GUSKIEWICZ,
and R.S. FUTCH, JR.,

Plaintiffs,

v. CASE NO. 89-207-CIV-ORL-19

FREEDOM SAVINGS
AND LOAN ASSOCIATION,
PHILLIP DONLEVY, et al.,

Defendants.

FREEDOM SAVINGS
AND LOAN ASSOCIATION,

Plaintiff,

v. CASE NO. 89-208-CIV-ORL-19

LAKE PICKETT, LTD.,
etc., et al.,

Defendants.

ORDER

THIS CAUSE was considered by the Court upon the Motion for Rehearing/Reconsideration of Order Granting Motion for Summary Judgment or Alternatively Motion for Partial Summary Judgment of Resolution Trust Corporation (Doc. No. 88 in Case No. 89-204, filed June 15, 1990); and the Memorandum of Law in opposition thereto (Doc. No. 89 in Case No. 89-204, filed June 21, 1990)

By its Order dated June 8, 1990, the Court acknowledged that in this Circuit the *D'Oench* doctrine and 12 U.S.C. § 1823(e) would not bar the assertion against the RTC of defenses such as equitable estoppel if such defenses are based on conduct of the federal banking

authority *itself* after it had acquired the asset in question. This is the import of *Federal Deposit Insurance Corporation v. Harrison*, 735 F.2d 408, 412-413 n. 6 (11th Cir., 1984). The Court found additionally, however, that the actions of which the Jones parties complain were committed by bank employees rather than by the FSLIC or the RTC itself. The fact that the bank employees may have been subject to the oversight of a federal banking authority at the time of the alleged wrongs does not make the RTC accountable for those actions. Although the result may operate harshly at times, to hold otherwise would defeat the purpose of the *D'Oench* doctrine. *See Metcalf, Ltd. v. Federal Savings and Loan Insurance Corporation*, 719 F.Supp. 953, 957-58 (D. Colo. 1988).

Federal Deposit Insurance Corporation v. Cherry, Bekaert and Holland, Case No. 88-1147-CIV-T-15C (U.S. District Court, Middle District of Florida, Tampa Division, April 18, 1990) and *Federal Deposit Insurance Corporation v. Jenkins*, 888 F.2d 1537 (11th Cir. 1989), two cases cited by the Jones parties in their Motion for Rehearing/Reconsideration, concern issues different from what is involved in this case. *Cherry, Bekaert and Holland* was a negligence action brought by the FDIC against third parties. *Jenkins* involved the issue whether the FDIC has priority over shareholders' claims against third parties. In the instant case, by contrast, the FDIC is pursuing collection of the defaulted debts of a failed bank, the situation for which the *D'Oench* doctrine and § 1823(e) were crafted.

For these reasons, the Motion for Rehearing/Reconsideration is DENIED.

DONE AND ORDERED at Orlando, Florida, this 29th day of June, 1989.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record

APPENDIX G – AUGUST 13, 1991 ORDER

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FREEDOM SAVINGS
AND LOAN ASSOCIATION,

Plaintiff,

v. CASE NO. 89-205-CIV-ORL-19

DUNMAR CORPORATION,
and MICHAEL D. JONES,

Defendants.

MICHAEL D. JONES,
ROBERT S. GUSKIEWICZ
and R.S. FUTCH, JR.,

Plaintiffs/Counter-
Defendants,

v. CASE NO. 89-207-CIV-ORL-19

FREEDOM SAVINGS AND LOAN
ASSOCIATION,
PHILLIP DONLEVY,
WILLIAM CRAWFORD,
and ROBERT STONE,

Defendants/Counter-
Plaintiffs.

FREEDOM SAVINGS
AND LOAN ASSOCIATION,

Plaintiff,

v. CASE NO. 89-208-CIV-ORL-19

LAKE PICKETT, LTD.,
a Florida limited
partnership,
MICHAEL D. JONES,
as General Partner d/b/a
LAKE PICKETT, LTD.,
a Florida limited partnership,

Defendants.

ORDER

This case was considered by the Court upon Motion of the Resolution Trust Corporation ("RTC") for Entry of Final Judgment in Favor of RTC as to Case Numbers 89-207 and 89-208 (Doc. No. 146) . There being no opposition contained in the record the Court enters its Order as follows.

The Court previously addressed this issue in its June 8, 1990, Order (Doc. No. 78) which denied entry of final judgment in favor of the RTC in Case Numbers 89-207 and 89-208 pending the resolution of the remaining claims in this consolidated case. Because the Court's Order was based upon the application of the *D'Oench Duhme* doctrine[1], the resolution of the remaining claims

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[1] The doctrine derives from *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, 315 U.S. 447 (1942), and its progeny, which insulates RTC from defenses and claims based

in Case Numbers 89-207 and 89-208 will not affect the judgment for RTC. Federal Rule of Civil Procedure 54(b) permits entry of final judgment on fewer than all the claims or parties if an Order of the Court completely disposes of the claims of, or against, the party moving or entry of final judgment. *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1566 (11th Cir. 1987)

Upon reconsideration the Court determines that there is no just reason for delay in the entry of final judgment. Consequently, the option of the RTC for Entry of Final Judgment in Favor of RTC as to Case Numbers 89-207 and 89-208 (Doc. No. 146) is GRANTED. Pursuant to Federal Rule of Civil Procedure 54(b) the Court directs the clerk to enter final judgment in favor of the Resolution Trust Corporation in Case Numbers 89-207 and 89-208.

DONE AND ORDERED in Chambers at Orlando, Florida, this 13th day of August, 1991.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES
DISTRICT JUDGE

Copies to:
all counsel of record.

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on "secret" agreements or representations not evident on the face of the loan documents.

APPENDIX H – SEPTEMBER 3, 1991 ORDER

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FREEDOM SAVINGS AND
LOAN ASSOCIATION,

Plaintiff,

v. CASE NO. 89-205-CIV-ORL-19

DUNMAR CORPORATION and
MICHAEL D. JONES,

Defendants.

MICHAEL D. JONES, ROBERT S.
GUSKIEWICZ AND R.S. FUTCH, JR.,

Plaintiffs,

v. CASE NO. 89-207-CIV-ORL-19

FREEDOM SAVINGS AND LOAN
ASSOCIATION, PHILLIP
DONLEVY, WILLIAM
CRAWFORD, ROBERT STONE,
THE FIRST, F.A., and
JACK SHIREK,

Defendants.

FREEDOM SAVINGS AND LOAN
ASSOCIATION,

Plaintiff,

v. CASE NO. 89-208-CIV-ORL-19

LAKE PICKETT, LTD., a Florida
limited partnership, and
MICHAEL D. JONES, as

General Partner,

Defendants.

_____/

ORDER

This case was considered by the Court on the following matters:

1. Motion of the First, F.A., Jack Shirek, William Crawford, and Robert Stone for Continuance and Memorandum of Law in Support Thereof (Doc. No. 156, filed August 16, 1991) and Memorandum of Law in Opposition to Motion for Continuance (Doc. No. 162, filed August 28, 1991).

Upon consideration, the Motion for Continuance (Doc. No. 156) is DENIED.

2. Motion of Michael D. Jones, Robert Guskiewicz, and R.S. Futch, Jr. and Lake Pickett, Ltd., and Michael D. Jones, as General Partner d/b/a Lake Pickett, Ltd. for Rehearing (Doc. No. 159, filed August 23, 1991).

The Motion of Michael D. Jones, Robert Guskiewicz, and R.S. Futch, Jr. and Lake Pickett, Ltd., and Michael D. Jones, as General Partner d/b/a Lake Pickett, Ltd. for Rehearing (Doc. No. 159) is DENIED.

DONE AND ORDERED at Orlando, Florida, this 3rd day of September, 1991.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES
DISTRICT JUDGE

Copies to:

E. Givens Goodspeed, Esquire
P.O. Box 2631
Orlando, FL 32802

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APPENDIX I – AUGUST 15, 1991 JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JUDGMENT IN A CIVIL CASE

FREEDOM SAVINGS AND
LOAN ASSOCIATION,

v.

DUNMAR CORPORATION
MICHAEL D. JONES

CASE NUMBER: 89-205-CIV-ORL-19 (LEAD)
89-207-CIV-ORL-19
89-208-CIV-ORL-19

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that final judgment is entered in favor of the Resolution Trust Corporation in case number 89-207-CIV-ORL-19 and 89-208-C/V-ORL-19.

August 15, 1991
Date

David L. Edwards
Clerk

Cindy Burgess
(By) Deputy Clerk

(2)

Supreme Court, U.S.
FILED
AUG 11 1995
OFFICE OF THE CLERK

No. 94-2014

In the Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL D. JONES, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESOLUTION TRUST CORPORATION IN OPPOSITION

WILLIAM C. COLLISHAW
General Counsel
ANDREW E. TOMBACK
Deputy General Counsel
MARK P. HILEMAN
Assistant General Counsel
SHEILA KRAFT BUDOFF
MITCHELL E.F. PLAVE
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Resolution Trust Corporation
Washington, D.C. 20006

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

17pp

QUESTION PRESENTED

Whether petitioners' tort claims against the Resolution Trust Corporation, based on a failed savings association's alleged oral agreements to modify written loan contracts, were properly dismissed as barred by the *D'Oench* doctrine and by 12 U.S.C. 1823(e).

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Twin Constr. Inc. v. *Boca Raton, Inc.*, 925 F.2d 378 (11th Cir. 1991) 12

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-2014

MICHAEL D. JONES, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESOLUTION TRUST CORPORATION IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1-31) is reported at 43 F.3d 587. The vacated panel opinion (Pet. App. 32-71) is reported at 7 F.3d 1006. The opinion of the district court (Pet. App. 72-84) is unreported.

JURISDICTION

The judgment of the court of appeals following rehearing en banc was entered on January 26, 1995. A petition for rehearing was denied on March 13, 1995. Pet. App. 85-87. The petition for a writ of certiorari

was filed on June 9, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arose from a banking relationship between petitioners, Michael D. Jones, Robert A. Guskiewicz, R.S. Futch, Jr., and Lake Pickett, Ltd., and Freedom Savings and Loan Association (New Freedom), a federal savings and loan institution.[1] At the time of the incidents alleged in this litigation, petitioners owed New Freedom, in the aggregate, more than $8,000,000 on two loan obligations, secured by mortgages on real property. Each of the loans was evidenced by a standard note (the Notes), and although both Notes had matured, neither had been repaid. Pet. App. 3-4.

Petitioner contacted prospective purchasers of the properties securing the loans, and offered to sell them the properties in exchange for assuming the obligations under the Notes. Under the written terms of the loan documents, however, the loan obligations could not be assumed without New Freedom's prior consent. Pet. App. 4-5. Petitioners contend that between February and May, 1988, over the course of several meetings, New Freedom employees agreed orally that New Freedom would permit assumption of the loans by the purchasers, lend additional funds, and extend the time for repayment. *Id.* at 4-5, 39. New Freedom's board of directors did not approve

---

[1] On July 23, 1987, the Federal Home Loan Bank Board (FHLBB) declared Freedom Savings and Loan Association insolvent. Its assets (including the loans at issue in this case) were transferred to a new federal savings and loan association with the same name, which the court of appeals referred to as "New Freedom." Pet. App. 4. We adopt the same convention.

petitioners' proposals on either loan, however, and when the negotiations broke down, petitioners brought suit in state court against New Freedom and various of its officers, claiming that New Freedom tortiously made false oral assurances regarding the loans. New Freedom counterclaimed to foreclose on one of petitioners' properties, and instituted separate foreclosure proceedings on the other property. Petitioners asserted counterclaims in the foreclosure proceedings that mirrored the claims they had raised in their initial action. *Id.* at 5, 74. Through their claims and counterclaims, petitioners sought to prevent New Freedom from enforcing the Notes, or to obtain an affirmative monetary recovery against New Freedom to set off their loan obligations.

2. On February 7, 1989, the FHLBB declared New Freedom insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as conservator. Pet. App. 5. On March 8, 1989, the FSLIC removed the cases to the United States District Court for the Middle District of Florida, where they were consolidated. *Ibid.* Pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (FIRREA), the Resolution Trust Corporation (RTC) has since replaced the FSLIC. The RTC, as receiver, retains the liabilities of New Freedom, and occupies New Freedom's place with respect to petitioners' claims against the failed institution. The RTC, in its corporate capacity, acquired New Freedom's assets and thereby succeeded to New Freedom's claims against petitioners. Pet. App. 5-6.

3. On June 8, 1990, the district court granted summary judgment for the RTC, holding petitioners' claims and defenses barred by the doctrine enunciated

by this Court in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and its statutory counterpart, 12 U.S.C. 1823(e) (Supp. V 1993).[2] Pet. App. 72-84. The court held that "[w]hen a federal banking authority seeks to collect on a note acquired by it in the course of a regulatory takeover or a purchase and assumption transaction, the *D'Oench* doctrine insulates the banking authority from defenses and claims which are based on agreements or representations not evident on the face of the note because such 'secret' agreements or representations could mislead the banking authority as to the true value of the assets of the failed bank." *Id.* at 76.

---

[2] Section 1823(e) provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

Pursuant to 12 U.S.C. 1441a(b)(4) (Supp. V 1993), the protection afforded the Federal Deposit Insurance Corporation (FDIC) under Section 1823(e) extends equally to the RTC.

4. The court of appeals affirmed the district court's judgment in part, and reversed it in part. Pet. App. 32-71. The only issue that petitioners raised, briefed, and argued on appeal was whether the alleged actions of New Freedom employees with respect to the loans should be attributed to the RTC, and whether the RTC should therefore be equitably estopped from asserting the bar of *D'Oench* and Section 1823(e). Gov't C.A. Br. 46 & n.72 (en banc); Pet. App. 70-71 n.7. The court rejected that claim, as foreclosed by 12 U.S.C. 1821(n)(6)(A) (Supp. V 1993). Pet. App. 57-59.[3] It reversed the district court's dismissal of petitioners' primary tort claims against the RTC as receiver, however, holding that those claims were "free-standing" tort claims, and as such were not subject to the *D'Oench* bar or to the requirements of Section 1823(e). Pet. App. 48-53.[4]

Judge Anderson dissented from that part of the court's ruling that reversed the judgment of the district court. Pet. App. 60-71. In his view, the tort claims alleged by petitioners were "sufficiently intertwined with oral representations made during ordinary banking transactions to be barred by *D'Oench*." *Id.* at 70.

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[3] The argument had previously been rejected by the district court, Pet. App. 78-79, and was later found by the en banc court of appeals to be wholly without merit, *id.* at 6 & n.1. Petitioners have not challenged that determination.

[4] The court of appeals affirmed the district court's ruling that petitioners' prayer for a declaration that their loan obligations were excused by the tortious conduct of New Freedom was barred by *D'Oench*, Pet. App. 34 n.1, and affirmed the district court's dismissal of petitioners' remaining claims against the RTC, in its corporate capacity, on other grounds, *id.* at 53-59.

5. The Eleventh Circuit granted the RTC's petition for rehearing en banc, vacated the panel opinion, and, after briefing and argument, affirmed the judgment of the district court. Pet. App. 1-31. Proceeding from the principle that *D'Oench* and Section 1823(e) bar tort claims based on oral agreements that arise in the course of regular banking transactions, Pet. App. 12-13, the court concluded that petitioners' claims, based on alleged oral assurances regarding changes to written loan agreements, were "precluded by the logic of [*Langley* v. *FDIC*, 484 U.S. 86 (1987)] and the theoretical underpinnings of *D'Oench* itself," Pet. App. 24-25. The court rejected petitioners' suggestion that it distinguish between claims asserted as defenses to payment and claims made in the nature of set-off, recognizing that "otherwise, an obligor could accomplish indirectly what *D'Oench* expressly prohibits, enforcement of an unwritten agreement." *Id.* at 21.[5]

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[5] On rehearing, petitioners argued for the first time that *D'Oench* and Section 1823(e) should not apply to their "free-standing" claims that New Freedom (i) wrongfully disclosed confidential information about their loans; (ii) intentionally interfered with their business relations; and (iii) breached its fiduciary duties. Pet. App. 7 n.2, 25. The court held that because those claims were not fairly presented to the district court in response to the RTC's motion for summary judgment, they were "deemed abandoned." *Id.* at 26-27. On that ground, the court declined to determine whether the claims were sufficiently independent of the Notes or the restructuring negotiations to escape the *D'Oench* bar. Pet. App. 25-26. Petitioners' failure to raise in the district court their claims of wrongful disclosure, intentional interference, and breach of fiduciary duty similarly preclude them from raising those claims in this Court. See *Ellis* v. *Dixon*, 349 U.S. 458 (1955)

ARGUMENT

The *D'Oench* doctrine and Section 1823(e) require that agreements reached in the context of regular banking transactions be documented in writing, approved by the financial institution's board of directors or loan committee, and recorded properly in the books and records of the financial institution if they are to be enforceable against the FDIC or RTC. See, *e.g.*, *FDIC* v. *Longley I Realty Trust*, 988 F.2d 270, 274 (1st Cir. 1993) (Section 1823(e) precludes appellants from binding FDIC to alleged settlement); *FDIC* v. *Hadid*, 947 F.2d 1153, 1157 (4th Cir. 1991) (applying *D'Oench* to bar arguments related to oral agreement allegedly made in course of loan restructuring). In *Langley*, this Court made clear that Section 1823(e) applies to bar a defense of fraud based on an alleged oral misrepresentation just as it would apply to bar an attempt to enforce that representation as an agreement against the FDIC. 484 U.S. at 96.[6]

(issue not raised at trial is waived for purposes of certiorari review).

[6] The courts of appeals that have ruled on the issue since *Langley* have uniformly applied the *D'Oench* doctrine, as the Court applied Section 1823(e), to bar tort claims arising from unrecorded agreements. See *Inn at Saratoga Assocs.* v. *FDIC*, No. 94-6205 (2d Cir. July 10, 1995), slip op. 5507 ("So long as the tort claims arise out of the secret agreement alleged, the common law doctrine applies * * *. Furthermore, the fact that plaintiffs assert the alleged agreement in support of their affirmative claim, rather than as a defense to an FDIC action, does not protect it from *D'Oench, Duhme* scrutiny."); *Castleglen, Inc.* v. *RTC*, 984 F.2d 1571, 1577 (10th Cir. 1993) (holding that fraud and misrepresentation claims were barred by *D'Oench* because "[i]f the *D'Oench* doctrine is to have any

The court of appeals correctly applied the *D'Oench* doctrine and Section 1823(e) to bar petitioners' claims against the RTC, which are based entirely on alleged oral agreements with a failed savings association. Unrecorded arrangements, such as those alleged by petitioners, purporting to alter the written terms of the Notes, are not enforceable under *D'Oench* and Section 1823(e), because such arrangements may affect the value of a bank's assets, and thereby mislead bank examiners. *Langley*, 484 U.S. at 91; *D'Oench*, 315 U.S. at 459-461. Requiring that such arrangements be documented and properly approved also serves to "ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." *Langley*, 484 U.S. at 92. It is undisputed in this case that there is no written

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force, courts cannot permit debtors to evade its prohibitions simply by recasting their contract defenses as affirmative tort claims"); *Oliver* v. *RTC*, 955 F.2d 583, 586 (8th Cir. 1992) (rejecting appellants' contention that "the *D'Oench* doctrine does not preclude their claim for breach of fiduciary duty because it is a tort claim rather than a contract claim," and stating that "to the extent the * * * breach of fiduciary duty claim is based on the asserted side agreements, the claim is barred by the *D'Oench* doctrine"); *FDIC* v. *Payne*, 973 F.2d 403, 406 (5th Cir. 1992) (holding defense of fraudulent inducement barred); *Timberland Design, Inc.* v. *First Serv. Bank for Sav.*, 932 F.2d 46, 50 (1st Cir. 1991) (holding that "*D'Oench* bars defenses and affirmative claims whether cloaked in terms of contract or tort, as long as those claims arise out of an alleged secret agreement," and explaining that "[t]o allow the plaintiff to assert tort claims based on the oral agreement would circumvent the very policy behind *D'Oench*, and therefore, *D'Oench* is generally said to apply to tort claims").

record of New Freedom's alleged oral agreements regarding petitioners' loan obligations, and "clear that the appropriate bank officials did not authorize assumption of [petitioners'] mortgage indebtedness." Pet. App. 68. The court of appeals' routine application of the *D'Oench* doctrine to bar petitioners' claims was consistent with this Court's opinions in *D'Oench* and *Langley*, and consonant with the approaches taken by other courts of appeals.

1. Petitioners argue (Pet. 15-18) that the court of appeals erred in applying *D'Oench* and Section 1823(e), because (they contend) their claims alleged "independent" torts, which do not fall within the scope of the doctrinal or statutory bar. They assert that the *D'Oench* doctrine has no more application to their claims than to tort claims "for personal injuries to a motorist in a collision with an armored car bringing money to the S. & L. office, or for insider profits in a sale of securities violating Securities and Exchange regulations." Pet. 16 (quoting *Astrup* v. *Midwest Fed. Sav. Bank*, 886 F.2d 1057, 1059-1060 (8th Cir. 1989)).

This case, however, does not implicate any "independent" tort exception to the *D'Oench* doctrine. The court of appeals' ruling was not, as petitioners contend (Pet. 18), based on the mere fact that the torts alleged "had something to do with * * * a 'regular banking transaction.'" Petitioners' claims are premised on New Freedom's breach of alleged oral understandings "that additional monies could be loaned, that extensions could be granted, and that [New Freedom] would permit assumption of the mortgage by a qualified buyer." Pet. App. 12. Claims based on oral understandings regarding an institution's extension of credit lie at the heart of the

D'Oench doctrine. Where, as here, a party asserts against the RTC claims based on an institution's alleged agreements respecting an extension of credit, and the alleged agreements have not been documented in writing, approved by the institution's board of directors or loan committee, or reflected in the institution's loan records, the claims are correctly barred. See *Langley*, 484 U.S. at 96.[7]

Petitioners' argument (Pet. 17) that "a nefarious scheme to interfere with the borrowers' sale of the properties * * * is not the kind of thing [bank officers] would reduce to a written agreement or document in the minutes of its Board of Directors" misses the point. No "agreement" to commit a tort was at issue in this case. Rather, petitioners' claims were based on alleged oral agreements to extend and allow the assumption of loans, and to advance additional funds. Agreements of that sort, "unlike [obligations] arising from an automobile accident, * * * could have, and should have, been documented in the bank's records." Pet. App. 16.[8]

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[7] That outcome is not unfair. As this Court has stated, "the borrower who has relied upon an erroneous or even fraudulent unrecorded representation" is in the best position "to protect himself by assuring that his agreement is approved and recorded in accordance with" Section 1823(e) and the *D'Oench* doctrine. *Langley*, 484 U.S. at 94; accord *D'Oench*, 315 U.S. at 461. As between the borrower and the RTC as receiver, which represents the taxpayers, as well as the failed institution's creditors and depositors, the borrower should bear the risk of failing to insist on proper documentation and approval of representations on which the borrower relies.

[8] The Eleventh Circuit distinguished between "typical claims like employment discrimination and automobile accidents which would be free-standing torts not barred by

The court of appeals therefore properly determined that petitioners' claims do not fall within a "free-standing" or "independent" tort exception to the *D'Oench* doctrine, no matter how that phrase is defined. Although *Astrup* v. *Midwest Fed. Sav. Bank*, *supra*, contained broad language that seemingly precluded the extension of *D'Oench* to tort claims, 886 F.2d at 1059, the Eighth Circuit has since described *Astrup* as holding merely that *D'Oench* does not affect tort claims that are not based upon an agreement. *Hanson* v. *FDIC*, 13 F.3d 1247, 1252 (1994). The court made clear that "actions sounding in tort but based upon unwritten or secret agreements between the parties are barred." *Ibid.*[9] See also *Oliver* v. *RTC*, 955 F.2d 583, 585-586 (8th Cir. 1992) (*D'Oench* precludes claims of breach of fiduciary duty based on unrecorded side agreements).

2. Petitioners argue (Pet. 19) that the court of appeals erred in applying the *D'Oench* doctrine and Section 1823(e) in this case because, they contend, those bars apply only to "claims and defenses directed to the validity of a specific loan asset." All of peti-

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D'Oench, and those relating to 'ordinary banking transactions,'" which would be barred. Pet. App. 15. See also *In re Geri Zahn, Inc.*, 25 F.3d 1539, 1543-1544 (11th Cir. 1994); *OPS Shipping Ctr., Inc.* v. *FDIC*, 992 F.2d 306, 310 (11th Cir. 1993) (applying the "ordinary banking transaction" test).

[9] The court in *Hanson* favorably cited *Timberland Design, Inc.* v. *First Serv. Bank for Sav.*, 932 F.2d 46, 50 n.4 (1st Cir. 1991), *Hanson*, 13 F.3d at 1252, which expressly criticized the language in *Astrup*, concluding that "[t]o the extent that *Astrup* supports the contention that *D'Oench* does not bar affirmative claims sounding in tort, we reject it as contrary to *D'Oench*'s policy of shielding the FDIC from secret agreements." *Timberland*, 932 F.2d at 50 n.4.

tioners' claims, however, are attempts to defeat enforcement of their loan obligations, either directly or through a setoff, and to prevent the RTC from recovering the amounts due under the Notes. There is no doubt, therefore, that petitioners' claims are related to specific assets of New Freedom. But even if petitioners were correct on that point, the courts of appeals have uniformly held that a claim need not directly challenge a particular asset to be barred by *D'Oench*.[10] Otherwise, claimants would be permitted to avoid *D'Oench* through artful pleading, defeating the underlying purposes of the doctrine.

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[10] See *Brookside Assocs.* v. *Rifkin*, 49 F.3d 490, 496 (9th Cir. 1995) (holding that *D'Oench* "applies to bar suit even when the RTC does not acquire a specific asset whose value is affected by the alleged secret agreement"); *OPS*, 992 F.2d at 309 ("We can discern nothing in the purpose of the *D'Oench* doctrine which would support appellant's proposed limitation of the doctrine."); *Adams* v. *Madison Realty & Dev., Inc.*, 937 F.2d 845, 857 n.5 (3d Cir. 1991) ("[S]ection 1823(e) and the *D'Oench, Duhme* doctrine require only that the FDIC have some interest in some asset."); *Twin Constr. Inc.* v. *Boca Raton, Inc.*, 925 F.2d 378, 382 (11th Cir. 1991) ("If *any* of a bank's assets are diminished by agreements not contained in the records of the bank," *D'Oench* applies.); *Hall* v. *FDIC*, 920 F.2d 334, 339 (6th Cir. 1990) ("*D'Oench* is important for allowing banking authorities to determine exactly what a bank's assets and liabilities are. The doctrine may therefore be invoked even where FDIC does not have 'an interest in an asset.' "), cert. denied, 511 U.S. 1231 (1991); *Bowen* v. *FDIC*, 915 F.2d 1013, 1016 (5th Cir. 1990) ("The agreement need not implicate a specific obligation, such as a note or other asset held by the FDIC."); *Bell & Murphy & Assocs., Inc.* v. *Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 753 (5th Cir. 1990) (rejecting argument that *D'Oench* doctrine "bars only claims or defenses based upon unrecorded side agreements that defeat the FDIC's interest in a *specific asset* acquired from a bank").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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